Nos. 72, 73, 74 & 75

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

Nos. 72, 73, 74, 75

Filed Nov 22, 1901.

THE STYRIA

The Steamship Styria, Antonio G. Scopinich
Claimant-Appellant
Petitioner
against
James L. Morgan et al.
Libelants-Appellants

The Same
Petitioner
against
Schuyler L. Parsons
Libelant-Appellant

The Same
Petitioner
against
Alfred S. Malcolmson
Libelant-Appellant

The Same
Petitioner
against
John Munroe et al.
Libelants-Appellants

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE STYRIA

CONVERSE & KIRLIN
Proctors for the Petitioner

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Of Counsel

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Supreme Court of the United States,

OCTOBER TERM, 1901.

The Steamship "STYRIA," ANTONIO G. SCOPINICH, Claimant-Petitioner, AGAINST JAMES L. MORGAN *et al.*, Libelants-Appellees.	No. 72.
AUSTRO-AMERICANA S. S. Co., Appellee, AGAINST 3,250 CANTARS OF BRIMSTONE, owned by JAMES L. MORGAN *et al.*, *ex Abbazzia*, Petitioners.	
The Steamship "STYRIA," ANTONIO G. SCOPINICH, Claimant-Petitioner, AGAINST SCHUYLER L. PARSONS, Libelant-Appellee.	No. 73.

AUSTRO-AMERICANA S. S. Co.,
Appellee,

AGAINST

4,550 CANTARS OF BRIMSTONE, owned by SCHUYLER L. PARSONS *ex Abazzia*,
Petitioners.

The Steamship "STYRIA," ANTONIO G. SCOPINICH,
Claimant-Petitioner,

AGAINST

ALFRED S. MALCOLMSON,
Libelant-Appellee.

No. 74.

AUSTRO-AMERICANA S. S. Co.,
Appellee,

AGAINST

1,500 TONS BRIMSTONE, owned by MALCOLMSON *ex* S. S. *Abazzia*,
Petitioners.

The Steamship "STYRIA," ANTONIO G. SCOPINICH,
Claimant-Petitioner,

AGAINST

JOHN MUNROE *et al.*,
Libelants-Appellees.

No. 75.

AUSTRO-AMERICANA S. S. Co.,
Appellee,

AGAINST

100 TONS BRIMSTONE, owned by JOHN MUNROE *et al.*, *ex Abazzia*,
Petitioners.

BRIEF FOR THE "STYRIA" AND THE AUSTRO-AMERICANA S. S. CO.

THE PLEADINGS.

The above four libels against the Austrian Steamship *Styria* were filed June 4 and 7, 1898, in the District Court, for the Southern District of New York, to recover damages for the non-delivery of 2,200 tons of sulphur (fol. 396) which had been shipped on the steamer at Port Empedocle (Girgenti), Sicily, on April 21, 22, 23 and 24, 1898, just at the outbreak of war between the United States and Spain (fols. 393-397), and had been relanded at the port of shipment, after the signing of bills of lading and the clearance of the vessel, because the sulphur had become and then was contraband of war.

The claim under each libel was for a complete breach of the contract to carry and deliver, and the damages alleged were $69,800. Two of the libels allege a conversion of the sulphur (*Parsons*, fol. 72; *Munroe*, fol. 186); the other two allege non-delivery (*Malcomson*, fol. 129; *Morgan*, fol. 21). The vessel was released from custody under stipulations for value in the sum of $42,500 and interest, an amount in excess of the invoice value of the goods.

The answers of the claimant are similar in all the cases. They admit the shipment of certain sulphur by the shippers, as alleged in the libels (but not the quantity); that bills of lading were duly issued

therefor; and that the sulphur was not delivered at the end of the voyage. They allege that by reason of the outbreak of war between Spain and the United States, and of the formal declaration by the Spanish Government issued April 25th (fol. 874) that sulphur was contraband of war, it became unsafe, in the master's judgment, to transport the cargo past the coast of Spain and through the Straits of Gibraltar to New York, during hostilities, and that, accordingly, he relanded and stored the cargo at the port of shipment on due notice to the shippers, and that he was justified under the circumstances in so doing. They further alleged that the master's act was authorized by the provisions of the bills of lading (fols 101-124).

The clauses in the bills of lading, on which the claimant relied (fols. 31, 32, 40), were these:

(*a.*) "Restraints of Princes and Rulers of People * * * excepted" (fol. 472).

(*b.*) "In case of blockade or interdict of the port of discharge, or if, without such blackade or interdict, the master shall consider it unsafe for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British Consul, and a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense and the master and owners discharged from all responsibility" (fols. 756, 757).

(*c.*) "With liberty (in event of steamer putting back to this, or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or trans-ship the goods by any other steamer" (fols. 743, 744).

The bills of lading also provided:

(*d.*) "The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods, whichever shall be least" (fols. 40, 753, 754).

The answers further alleged that during the months of August and September the shipowner brought the sulphur forward in the *Abbazia*, another of its vessels, and delivered it to the consignees under the terms of a stipulation which was agreed to by all the parties to these actions (fol. 42). This stipulation is given in full at page 13 of this brief.

The final allegations of the answers were that the libelants had sold the cargo pursuant to the provisions of the foregoing stipulation; that the amounts realized on such sales exceeded the invoice price, and that accordingly, under the terms of the stipulation, and of the above clause (*d*) of the bill of lading, the libelants had sustained no damages which could be recovered in these proceedings (fols. 173, 174).

The four cross-libels against the consignments of sulphur were filed by the shipowner to recover the expenses incurred in the performance of the stipulation of August 12, 1898 (*post*, p. 13). It was provided, in the second paragraph of the stipulation, that the shipowner should have a lien on the cargo for these expenses in addition to the lien for freight (fols. 789–792).

The answers of the claimants in these cases questioned the right of the master of the *Styria* to reland the cargo originally, and denied that the expenses incident to bringing it forward by the *Abbazia* were properly chargeable to the cargo (fols. 266–271, 290–311, 329–340, 357–369.

The Facts.

The *Styria* is an Austrian steamship owned by the Austro-Americana S. S. Co.; Burrell & Son, of

Glasgow, were her managers (fols. 389, 601, 662). The voyage on which she was bound at the time of the occurrences here in controversy, was from Trieste *via* Sicilian ports to New York. Some general cargo for New York was laden at Trieste (fol. 393). The steamer sailed on her voyage from that port April 16, 1898 (fol. 391), bound for Port Empedocle (Girgenti), her second loading port, which she reached April 21st (fols. 393, 394). The loading of sulphur was begun on the same day (fol. 394). Five shippers at that place furnished for shipment about 2,200 tons of sulphur, the cargo here involved, all which was laden on the vessel on or before April 24th (fols. 395–397). Speaking from recollection, the master stated that a lot of about 40 tons, the last of the shipment, was laden on Sunday, which he thought was April 25th (fols. 396, 397). Sunday, however, was the 24th of April.

All the bills of lading were signed and delivered on or before April 24th (fols. 399–404).

The steamer was cleared at the Custom House of Port Empedocle on April 24th (fol. 409). She was then free and clear, all her business with the port was finished, and she was ready to proceed on the voyage.

Meantime, unknown to the master, war had broken out between Spain and the United States.

On April 20th the President approved a joint resolution of Congress recognizing the freedom and independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces under his command to carry the resolution into effect (30 *Stat. at L.*, p. 738).

The Spanish Minister at Washington, on the same date, demanded and received his passports (*Foreign Relations*, 1898; *The Pedro*, 175 U. S., at p. 356).

On the morning of April 21st, our Minister at Madrid was informed by the Spanish Minister of Foreign Affairs that diplomatic relations between the two governments were broken off. He was, therefore, unable to present to the Spanish Government the demand he was instructed to make that the resolutions be complied with on or before the 23d of April (*Foreign Relations*, 1898; The *Pedro*, 175 U. S., at p. 356).

Immediately on receipt of a message from our Minister, announcing the action of the Spanish Government, the Secretary of the Navy, on April 21st, instructed the Commander-in-Chief of the North Atlantic Squadron to institute a blockade of certain ports in the Island of Cuba (*Report of the Bureau of Navigation*, 1898; *Appendix*, p. 175), and on April 22d the President publicly proclaimed this blockade (30 *Statutes*, 1769).

On April 22d the first overt act of war was committed by the capture of the Spanish merchant steamship *Buena Ventura* (*The Buena Ventura*, 175 U. S., 384).

On April 25th the Queen Regent of Spain issued a decree (Rec., pp. 217–219), in which it was recited that a state of war existed between Spain and the United States, and that the treaty of peace and friendship existing between the two countries was terminated (fol. 867). This decree further stated the principles on which the Spanish Government intended to conduct the war (fols. 868, 874), and contained the following provisions material to these cases:

"ART. V. In order to capture the enemy's ships, to *confiscate* the enemy's merchandise under their own flag, and *contraband of war under any flag*, the Royal Navy, auxiliary cruisers and privateers, if and when the latter are authorized, will exercise the right of visit on the high seas and in the territorial waters of the enemy, in accordance with international law and any regulations which may be published for the purpose" (fol. 871).

"ART. VI. Under the denomination contraband of war, the following articles are included:

"Cannons, machine-guns, mortars, guns, all kinds of arms and fire arms, bullets, bombs, grenades, fuses, cartridges, matches, powder, *sulphur*, saltpetre, dynamite, and every kind of explosive, articles of equipment like uniforms, straps, saddles and artillery and cavalry harness, engines for ships and their accessories, shafts, screws, boilers and other articles used in the construction, repair, and arming of warships, and in general all warlike instruments, utensils, tools, and other articles, and whatever may hereafter be determined to be contraband" (fol. 872).

"ART. VIII. The Minister of State and the *Minister of Marine are charged to see the fulfillment of the present Royal Decree and to give the orders necessary for its execution*" (fol. 874).

On the same day (April 25th), the President transmitted a message to Congress, suggesting the advisability of a formal declaration of war (*Messages and Papers of the Presidents*, Vol. 10, p. 154). The Congress thereon passed and the President approved the following act:

"AN ACT declaring that war exists between the United States of America and the Kingdom of Spain.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:*

"FIRST: That war be, and the same is hereby, declared to exist, and that war has existed since the twenty-first day of April, *anno domini* eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.

"SECOND: That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States

the militia of the several States to such extent as may be necessary to carry this Act into effect.

"Approved April 25, 1898" (*30 Stat. at Large, Pt. 2, Ch. 189*).

When it became known that a state of war actually existed between Spain and the United States, the managing owners, on or before April 26th, telegraphed to the master to discharge the sulphur (fols. 412, 495, 515).

The relanding of the cargo was also in accordance with the master's own judgment, based on the information available to him in Sicily (fols. 411, 412, 413, 426, 458-60, 491-492, 493, 537). He says that he knew it was contraband (fols. 452, 453, 471), and that Spain so regarded it (fols. 453, 454, 473, 501); that he did not deem it safe to proceed with the sulphur (fol. 537); that without the owners' instructions he would not have sailed with it without knowing certainly that sulphur was free (fol. 502); that he knew war existed between Spain and the United States, and had heard that a blockade of New York was going on (fol. 462); that his course lay along the Spanish coast and by the Spanish lighthouses (fol. 413); that it was reported in Sicily that Spanish men-of-war were looking for ships along this coast, and that he believed the report (fols. 493, 494); that the newspapers in Sicily reported the capture of a sulphur ship (fols. 501, 523), and that up to the time he left Sicily there was no public or official declaration that sulphur had been excluded by Spain from the list of contraband goods (fols. 452, 467, 474, 499, 500, 534).

The master's testimony as to these matters is undisputed.

He further said:

"In fact I didn't bring it because I could see through the newspapers that it was contraband of war although I acted on the owner's instructions to land the goods for I would never have sailed with

such a cargo because I might be caught here by the enemy—your enemies I mean (fol. 412).

"Q. Did you as a matter of fact, consider it safe to bring brimstone?

A. No, I did not think it safe. When you see in the papers the ships are stopped with sulphur you would not call it safe" (fol. 537).

The work of discharging and storing the sulphur was begun on April 29th, and was finished at noon of May 7th (fols. 437, 439).

Prior to commencing the discharge, the master, in accordance with clause (*b*) of the bill of lading (*ante*, p. 4), sent registered letters in the following form to each of the shippers, and also to the consignees, where na ned:

"PORT EMPEDOCLE, 27th of April, 1898.

"On finding risky my passage to New York with the actual sulphur cargo, for facts of war, I give you notice that I am discharging your cargo for your account and risk, under care of the mercantile agent, Mr. William Pierce, depositing the same in the warehouses of Mr. Zenobia Urso, and if these are not sufficient, in the warehouses of the British Consulate, faculty which I have in force in the bills of lading.

"With my kindest regards, &c.,

ANTONIO G. SCOPINICH,

"Master Austrian Steamer *Styria*"

(fol. 427).

On completion of the unloading of the sulphur, the master sent to each of the shippers a registered postal card containing the following notice:

"EMPEDOCLE, 7th May, 1898.

"Referring to my letter of the 27th last, by which I gave you notice that the parcel of sulphur loaded by you on board the Austrian steamer *Styria* for New York, is laid at the risk and expense, in the

warehouses of Mr. Zenobio Urso here, and as soon as you will pay the expense here made for your account, in conformity with the bills of lading, the said sulphur will be delivered to you" (fol. 443).

On the same day he also sent registered postal cards containing similar notices to such of the consignees as were named in the bills of lading (fol. 445).

The *Styria* was again cleared from the Custom House of Port Empedocle on May 7th, and on the early morning of the 8th she proceeded on her voyage to New York with such cargo as she had laden at Trieste, but without any of the sulphur that had been shipped at Port Empedocle (fols. 535, 447, 448).

Additional cargo, consisting of about 40,000 boxes of fruit (fols. 480, 518) was shipped at Messina and Palermo. She finally left Sicily on May 9 (fol. 448).

The libelants contended in the Courts below, that on or before that date, an arrangement had been reached between Spain and Italy under which it would have been safe and prudent for the master to have proceeded with the sulphur on board, that he had read reports of this fact in a certain Sicilian newspaper, and was bound to act on it.

The evidence was undisputed that up to the time of the steamer's departure no official or public statement had been issued under or by authority of the Spanish Government removing sulphur from the list of contraband articles (fols. 467, 468, 469, 474, 495, 498, 499, 500, 527, 532, 533, 534, 550, 575, 579). In point of fact, the *Spanish Govment never issued any official or public declaration removing sulphur from the list of contraband*, or in any manner taking it out of the scope of her proclamation of war (fols. 849, 834).

It appears, however, from letters from the British Foreign Office at London, dated July 8, 1898, and July 13 respectively (fols. 837–840, 841–845), that on

May 6 the Spanish Minister of Foreign Affairs informed the Italian and the British Ambassadors that, *as a temporary measure*, commanders of the Spanish vessels *would be* instructed to respect sulphur ships. When such orders actually *were* given does not appear. On May 31, for the first time, the Spanish Government informed the two Ambassadors that these orders would not be changed without previous notice (fols. 843, 851). The Spanish Government refused to make any public announcement on the subject, and the master had no official information of the private agreement until after the ship's arrival in New York.

The managers of the vessel, Burrell & Son, first heard of the temporary agreement on May 10th, when the English Foreign Office informed them that the Spanish Government laid stress on the fact that the arrangement was temporary only (fols. 805–811).

On May 12th Burrell & Son telegraphed to the Foreign Office in London as follows:

"Referring to your telegram to us of tenth inst., it is rumored that Spanish Government yesterday declared sulphur non-contraband, kindly wire whether temporary relaxation you reported has been made permanent or still remains temporary" (fol. 814).

And on the same day they received from the Under Secretary of State an answer saying, "No later information received" (fol. 816).

They did not learn of the promise that the temporary arrangement would not be revoked without previous notice until June 5th, after the ship's arrival in New York (fols. 821, 823, 825, 843).

Shortly after the *Styria's* arrival on June 3, 1898 (fol. 448), the above libels against the vessel were filed, as before stated.

The Peace Protocol between Spain and the United States was signed August 12, 1898. Negotiations looking to the forwarding of the cargo, which had

been pending some time, were concluded on August 22d, and embodied in the following stipulation (*Styria's* Ex. C):

"1. The claimant shall forward the cargo landed ex *Styria*, at Port Empedocle, on the first available steamer from that port to New York, and shall deliver the same to the consignees, upon the terms, and for the freight specified in the original bills of lading, the consignees to receive the same and to pay the agreed freight on right and true delivery; the goods upon arrival to be sold at current market rates and the proceeds, less charges incurred, to be credited on account of the damages, if any, recovered in these cases by the libelants.

"2. The claimant shall have a lien on the portions of the cargo to be delivered to the several libelants for the respective amounts of the charges against the respective portions of the brimstone in Sicily, provided the claimant was justified in relanding and storing the cargo at Port Empedocle as and when he did. If it be held that the relanding and storage of the cargo was not justified, then the said brimstone shall be free from any lien on account of the aforesaid charges or expenses, except freight, which is provided for in paragraph first of this stipulation.

"It is the purpose and intent of this paragraph of the stipulation to provide that if the claimant was justified in relanding and storing the cargo as and when he did, he shall have a lien upon the respective consignments for their respective proportions of the charges and expenses against the same, which the libelant would have had to pay (exclusive of the charges provided for in the first paragraph of this stipulation), if they undertook to forward the cargo for their own account.

"3. This stipulation and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits, except as herein provided.

New York, August 12, 1898" (fol. 785).

Pursuant to this agreement, the shipowners forwarded the cargo in their steamship *Abazzia*, which sailed from Port Empedocle, September 4th (*Thianich*, fol. 618), and arrived in New York, Septem-

ber 30th (*Thianich*, fol. 648). The sulphur was thereon delivered to the consignees, who accepted it and paid the freight stipulated for in the *Styria's* bills of lading.

The *Abazzia* was detained at Girgenti from the 24th to the 29th of August, owing to the fact that the shippers for whose account the sulphur had been landed from the *Styria* either were not informed of the agreement to forward it, or were uninstructed as to their duty in the premises, and declined to assist in obtaining its release (*Thianich*, fols. 603, 606, 615). Damages are claimed for this detention. The expenses of relanding the cargo from the *Styria*, of reloading it on the *Abazzia*, and all incidental expenses except the storage, were paid by the shipowners, and are proved in the depositions of Scopinich and Thianich (pp. 138–143, 155–157). The storage charge, in accordance with the custom a Girgenti, was taken by the storehouse keeper in kind. One per cent. of the sulphur was kept by him for his charges (fols. 627, 628).

There was no evidence of any opportunity to transship the cargo earlier than was done by the *Abbazia* under the stipulation of August 12th.

The Decisions.

Brown, *J.*, in the District Court held that the exceptions (*a*) and (*b*) of the bills of lading, quoted above, were applicable to the case, but that the master's right under them could not be exercised without waiting a reasonable time to see whether the danger of continuing the voyage with the sulphur might not be removed by negotiation between the Italian and the Spanish governments (*Opinion*, fols. 941–947); that such a reasonable time would have been two weeks after the discharge was begun, or until May 10th; that the claimant could derive no advantage in the present case under the transshipment clause (*c*); that accordingly the libelants were entitled to de-

crees in their favor; but that under clause (*d*) their damages should be limited to the invoice value of the sulphur with the freight added (fols. 952, 1177-1179), against which should be credited, under the stipulation of August 12th, the net proceeds of the sale of the cargo. He further held that the freight and the cost of weighing should be deducted from the proceeds of sale as a "charge," under the stipulation, in determining the amount of the proceeds (fols. 952-953, 1178).

On this basis, decrees were entered in favor of Malcolmson for $1,186.11 (fol. 1195); of Morgan for $280.48 (fol. 1184); of Munroe for $563.99 (fol. 1201); of Parsons for $235.36 (fol. 1190); total $2,265.94.

The grounds on which the District Judge's decision proceeded, as regards *liability*, were these (p. 236):

"Though exceptions (*a*) and (*b*) above noted in the bill of lading contemplate circumstances of war and are therefore applicable in the extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master as the agent of all concerned is still bound to a prudent regard for the interests of the cargo, and 'must endeavor to hold the balance evenly' between ship and cargo when their interests conflict (The *Julia Blake*, 107 U. S., 418, 427-8, 431; The *Spartan*, 25 Fed., 44, 56-58; *L'Amerique*, 35 Fed., 844-5; *Cargo ex Argos*, L. R., 5 P. C., 134, 165; *Nobel* v. *Jenkins* (1896), 2 Q. B., 326 331-2).

"The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar would presumably be pecuniarily dangerous to the cargo, even though the vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure though she were ultimately released. Except, therefore, for the negotiations immediately entered on for procuring an exception of sulphur from contraband I have no doubt that it would have been both the right and

the duty of the master for the interests of the cargo as well as of the ship, to refuse to sail with this cargo after clearing on April 24th until there was some reasonable assurance of safety. See the *San Roman*, L. R., 3 Adm. & Eccl., 583, where there was a delay of three months. The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo, the master in my judgment was bound in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard.

"No doubt any delay entailed some loss upon the ship, and what should be deemed a reasonale period ought to be determined with reference to the circumstances and interests of both. But taking the circumstances altogether, I am of opinion that the commencement of the discharge on the 27th was too hasty and precipitate, and that the master was guided in that matter by the telegram from Burrell & Son, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time. Had he been left to exercise his own judgment, I do not think, upon the testimony, that he would have discharged the cargo--especially not at the time he did; and that before he left Italy, although there was no formal publication of the exception of sulphur, there were such informal assurances coming from the Spanish Government as left no reasonable apprehension of danger from sailing with a sulphur cargo.

"I must find, therefore, that the ship was not justified by clauses (*a*) and (*b*) of the bill of lading above quoted in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there was reasonable assurance that it would be safe to go on with the voyage, and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time. In *Nobel* v. *Jenkins*, *supra*, the facts were otherwise (fols. 943-947)."

Judge Brown was further of the opinion that the transshipment clause (c) might be regarded as appli-

cable to the case, "though without advantage in the result to the defendant, since the defendant would, under this clause alone, stand chargeable with all the expenses of discharge, storage and reloading" (fol. 948).

The measure of *damages* under the bill of lading clause (*d*) was held to be the invoice value and freight (fols. 952, 953), and was more fully dealt with by the District Judge in his opinion overruling the exceptions to the Commissioner's report in the cases of Morgan (fols. 1177–1180).

The Commissioner found that there was a complete breach of contract, but that the damages were limited to the invoice value, by clause (*d*) (fols. 1093–1112). Against the damages so limited were to be credited the net proceeds of sale (including freight as a charge against the goods in ascertaining such net proceeds). On those principles the Commissioner stated the damages in Morgan's case as follows:

Invoice value of the consignment			$4,279 00
Proceeds of sale		$4,513 46	
Weighing	$24 40		
Freight	354 98		
		379 38	
			4,134 08
Balance			$144 92

for which, with interest, recovery was allowed (fol. 1111).

The libelant Morgan excepted to the report because:

"III.—Said Commissioner adopted an erroneous method of assessing the damages, the true measure of damages being the difference in the value of the sulphur at the time and in the place it should have been delivered, viz.: June 3d, 1898, at New York, and at the time of its actual delivery in October, 1898.

"IV.—Said Commissioner erred in holding that the clause in the bill of lading limiting liability to the invoiced or declared value of the goods was applicable to the case.

"V.—If said clause does apply, said Commissioner erred in his interpretation of it, the true meaning of the clause being that cargo owners may recover up to, but not beyond the invoice value of their goods" (fols. 1135, 1136).

The opinion of Brown, *J.*, overruling these exceptions, was as follows:

"By the contract of the bill of lading the invoice value is the basis of settlement of any loss or damage; and a construction seems to me impossible, and in fact absurd, that would call for the same payment on a partial loss as upon a complete destruction of the goods. Hence [here*t*] the special agreement made pending the action further limits recovery.

"No freight was due except upon delivery at New York. Clause 2 of the stipulation recognized the freight as a lien incurred and charged upon the goods by the transportation. It was immaterial whether this lien for freight was paid before or after the sale. If not paid before sale it must have been paid *out of the proceeds* of sale, and if paid by the consignee before sale, it was paid as a lien or charge incurred upon the goods, in accordance with both clauses of the stipulation and *hence to be deducted from the amount of proceeds of sale to be credited to the claimant against the whole damages, i. e., the invoice value as limited by the B/L which was adopted in the stipulation* (The *Hadji*, 18 F. R., 489; affd. 20 F. R., 875; approved in The *Lydian Monarch*, 23 F. R., 298, 300).

"There was no conversion of the goods; only a mistaken theory of the contract rights and duties. It was the owner's duty to transport the goods and the consignee's to pay the freight, and that was ultimately done by each.

"Commissioner's report affirmed" (fols. 1177, 1178, 1179, 1180).

The damages in the three remaining cases were afterwards adjusted in accordance with the principles enunciated in the test case of Morgan. The decrees in all the cases amounted to $2,265.94 (*ante*, p. 15).

The four cross libels were dismissed, with costs (pp. 239, 240, 241, 242).

The libelants appealed to the Court of Appeals on the question as to the proper measure of damages (pp. 322-325); the claimant and cross libelant appealed on the merits, and also on the question as to the proper measure of damages, claiming that freight should not have been deducted (fols. 1305-1335).

The Court of Appeals reversed the decrees below, both on the merits and as to the measure of damages, and entered orders which in the result are more favorable to the libelants than the decrees below, to the extent of over $20,000 (*Opinions*, pp. 349, 350, 363, 364; *Orders*, pp. 365 *et seq.*).

The Court of Appeals decided that with 2,200 tons of contraband cargo, the continuation of the voyage which would lead the ship along the coast of Spain and through the narrow Straits of Gibraltar close by the Spanish naval base, would necessarily be attended by a danger of capture, which it was the master's duty to avoid, and that accordingly under the exception of "Restraints of Princes and Rulers," he was justified in landing and storing the cargo as he did on April 27th (pp. 341-345).

But the Court further held that before he sailed finally from port and on May 6th, a newspaper in Sicily printed what purported to be a telegram from the Italian Minister of Agriculture to the Chamber of Commerce at Palermo, to the effect that, at the request of the Italian Government, the Spanish Government had given notice to the commanders of its vessels to let sulphur pass free; and that, although it is undisputed that there was no official confirmation of this message, and that such orders, if given, were liable to be revoked at any moment, and that vessels or their cargoes, on voyages, would thus be liable to capture, the master should have accepted this newspaper report as suffi-

cient, and should have reloaded and proceeded with the contraband cargo.

The Court adds that if the *Styria* had been captured "the Italian Government would have good ground for claiming indemnity from Spain, and a *casus belli* in case of its refusal" (pp. 347, 348).

How this would benefit the Austrian shipowner, or the owners of the non-contraband cargo, the decision does not state.

The reasoning of the opinion on this branch of the case is thus stated by Lacombe, *J.* (p. 346).

"On May 25th the *Giornale di Sicilia*, a newspaper published at Palermo and which the Captain saw from day to day stated that Messina merchants had asked their Parliamentary Deputy to urge the Government to co-operate to exclude brimstone from being considered contraband. From day to day thereafter the paper was filled with reports and rumors as to the progress of this movement to secure exemption. But down to the 6th of May, not one of these reports bore the stamp of authority; no one vouched for their accuracy. The statements in the clippings from the newspaper which have been printed in the record are merely the expression of the beliefs and expectations of its correspondents in Rome, or elsewhere, furnishing copy to a paper published in a community where an intense interest was felt in having sulphur exempted. There was no reason why it should be exempted; it is a variety of merchandise such as always has been contraband, its exportation to the United States might well be considered an "aid" to Spain's enemy, no one appears to have suggested that the United States concede the same exemption. On the one hand it might be urged that it would please the Government and people of Italy to grant the request, but on the other hand, in the case of merchandise so highly contraband, neither the Italian Government nor people could justly take offense if Spain should insist on exercising the rights which international law accords to every belligerent. Enlightened by the information now made known, we can see that the hopeful prognostications of the writers for the Journal of Sicily were well founded, but there was nothing to give any such assurance at the time they appeared. We should hesitate to hold that it

was the duty of the master under similar circumstances to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons, on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken.

"By May 6th, however, the situation changed. The Journal of Sicily published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, as follows:

"'Chamber of Commerce, Palermo: I inform the Chamber of Commerce for the useful information of merchants, that by the decree of April 23d of the Spanish Government, are considered as contraband of war, arms, projectiles, fuses, powder, sulphur, nitre. * * * I would also state that in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free. (Signed). The Minister Coeco-Ortu.'

"Here was an official declaration which the master should have accepted as sufficient. The Italian Government, through a Cabinet Minister, announces that official action has been taken by the Spanish Government, the practical result of which was to make sulphur free from capture. It matters not that the Spanish Government might thereafter reconsider this decision and direct its cruisers to seize sulphur, because it was to be assumed that cargoes taken out in reliance upon the proclamation of the Italian Government would be respected. If they were not the Italian Government would have good ground for claiming indemnity from Spain, and a *casus belli* in case of its refusal."

On the question of the measure of damages the Court of Appeals say:

"The measure of damages in such cases is well settled. The loss is the difference between the price the goods actually brought and the price they would have brought had they been sold on the day when they should have arrived" (p. 349).

The ruling of the District Judge that the invoice value should be taken as the basis of damages from

which there should be deducted the amounts realized when the goods were brought forward in the *Abbazia* under the stipulation of August 12th (p. 197) was disapproved.

It happened that by reason of the outbreak of war there was a great demand for sulphur in June, 1898, in consequence of which the price is said to have advanced from $18.50 a ton to $30 and $35 a ton, while the price in October, when the goods were finally brought forward for sale under the terms of the stipulation of August 12th, had again fallen to the normal figure of about $18.50 a ton. The decision of the Court of Appeals, if sustained, would award damages to the libelants for the amount of such profits in excess of the invoice value to the extent of about $25,000.

The claimant applied for a rehearing in the Court of Appeals, on the ground that the decision as to the measure of damages was contrary to the terms and spirit of the stipulation of August 12th, under which the goods were brought forward for sale on the terms and conditions therein stated (*Petition*, pp. 352–359).

In view of the reservations of the stipulation it was pointed out that the intention was that the cases should be dealt with, and the damages for non-delivery, if liability was established, should be measured precisely as though the stipulation had not been made, and the cargo had not subsequently been brought forward; and that only after this had been done should the stipulation be looked at to ascertain the amount of the credit to be set against such damages.

The application for a rehearing was granted (p. 360) and a reargument was had. The opinion, filed after the reargument (pp. 363–364) reaffirmed the previous decision, holding in effect that if the cargo had not been brought forward the ship's liability would not have been limited to the invoice value of the goods by the clause contained in the bill of lading (p. 363). It further decided that the parties did not intend, by

the stipulation, that which had been explicitly provided in it, namely, that the proceeds of the sale should be credited against the judgments recovered by the libelants (p. 364).

The claimant in the four main cases made application to this Honorable Court for writs of *certiorari* to review these findings, and the application having been granted the claimants in the four cross-libels made similar applications, which were also granted.

POINTS.

I.

There was no contract to carry contraband cargo. The outbreak of war rendered sulphur contraband and unlawful cargo, and relieved the shipowner of all obligation to forward it.

a. In every contract of shipment it is implied that the cargo is lawful merchandise, not contraband (*Boyd* v. *Moses*, 7 Wall., 316, 319-320).

The shipowner's undertaking in these cases to carry the sulphur, was based on the supposed fact that it was lawful cargo. In point of fact the sulphur had become unlawful cargo under the laws of war, by reason of the outbreak of hostilities between Spain and the United States (3 *Kent's Com.*, *267).

Not only was sulphur of the class of cargo known as "absolutely contraband" under the law of nations (2 *Halleck's International Law* [Baker's Ed.], 224, 225; *Holland's Naval Prize Law*, 19; *The Panama*, 176 U. S., 535, 545), but it had been specifically designated as contraband in the Spanish proclamation of war, in which orders had been given to the Spanish authorities to search vessels for it and confiscate it wherever found (*ante* p. 7).

The minds of the parties, therefore, never met on the proposition to transport a contraband cargo; the relanding of the cargo at the port of loading to the order of the shippers was not a breach of contract, and was not an act that entailed any liability for damages therefor on the ship.

The District Court does not seem to have passed on this question specifically, but it is the subject of a distinct finding by the Court of Appeals as follows (p. 344):

"The master, where the contract was made in times of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of war had become contraband."

* * * "The ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she had never entered."

The *Styria*, as a common carrier, could have refused to accept the sulphur if her master had known that a state of war existed when the sulphur was tendered for shipment (*Boyd* v. *Moses*, 7 Wall., 316, 319–320; *Weston* v. *Minot*, 3 Woodb. & M., 426; 29 Fed. Cas., 807, 810; *Carver Car. by Sea*, 3d Ed., § 244).

The fact, therefore, that the master received the sulphur in the mistaken belief that it was lawful cargo, or that events occurring between the receipt of the cargo and the ship's readiness to sail, changed the lawful character of the cargo, and made it unlawful, cannot make him subject to the obligations which would have been imposed on him by the contract, or as a common carrier, if the cargo had in fact been lawful.

There can be no doubt that the master would not have been justified, from any point of view, in starting on a voyage with contraband cargo to the port of a belligerent.

b. According to the ancient law and the usage among nations, if a ship was captured with contra-

band on board, the vessel was condemned as well as the cargo.

On this, *Bynkershoek Quaestionum Juris Publici (1737), Liber I Cap. X, p. 77:*

"Ceteroquin regula est, pactis fere perpetuis probata, ne non hostes ad hostes nostros vehant *contrabande goederen*, si vehant & deprehendantur, in commissum cadant, exceptis autem his libere utrimque mercantur, & quaecunque alia ad hostes vehunt impune."*

The learned *Heiniccius* considers this question in his *Operum ad Universum Juris Prudentiam De Navibus Ob Vecturam Vetitarum Merciurn Commissis* (1746), *Cap. II., Sec, III., p. 342:*

"Quamvis autem tantus sit nautarum naviumque favor, ut nihil reliqui fecerint legislatores, ut illos, quantum salva republica fieri posset, in tuto collocarent; saepenumero tamen contingit, ut captae pro commisso teneantur. Non modo enim ab hostibus & praedonibus maritimis capiuntur, qui sibi in hostium naves omnia licere existimant, verum etiam ab amicis si merces vetitae vel ad hostes vel ad cives ipsos advehuntur. Hoc enim casu non solum merces ipsae, verum etiam navis cum universo adparatu nautico comissae iudicantur. * * * Ast si certae merces illicitae declarantur, lex commissi est, ne merces eo vehantur, adeoque ea lex & merces ipsas, & navem, qua vehuntur, complectitur. Aequum id Romanis iam visum est. Ait enim *Paullus* Iureconsultus: 'Dominus navis, si *Illicite* aliquid in nave, vel ipse, vel vectores imposuerint, *Navis* quoque fisco vindicatur.' Et hoc iure hodienum utuntur gentes, quoties cum aliis bellum gerunt.

* "In other respects it is the rule attested by an almost unbroken line of treaties, that neutrals shall not carry to our enemies contraband goods; if they do carry and are caught, they incur confiscation, those things, however, being excepted which they traffic in freely on both sides, and everything else that they carry to the enemy without penalty."

Tunc enim omnes naves, mercibus illicitis onustae, una cum mercibus a fisco occupantur."*

SEC. VI.:

" Quamvis vero hoc jus merces illicitas una cum navibus capiendi & antiquum satis & hodienum inter gentes frequentissimum fit: in promtu tamen sunt exempla, quod inter gentes aliud convenit."†

Heiniccius then enumerates certain treaties which expressly exclude from condemnation the

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* " But, however great the good-will toward sailors and ships may be, as the law-givers, indeed, have left nothing undone that they be held harmless, so far, indeed, as it can be done with safety to the State, yet it happens frequently that the captured vessels are held for confiscation; for they are seized not only by the enemy and by privateers who think that all things are permitted to them with respect to the enemies' ships, but also by neutrals if unlawful merchandise is carried to the enemies or to the citizens themselves.

For in this event not only the merchandise itself, but also the vessel with all its tackle are adjudged confiscated. * * *

But if indeed certain merchandise is pronounced unlawful, the law of confiscation is that the merchandise shall not be taken thither; and, indeed, the law is that both the merchandise and the ship in which it is carried are confiscated. That indeed seemed a just thing to the Romans, for Paullus, skilled in the law, says: ' If the master of the ship or the sailors have placed anything on the vessel unlawfully, the vessel also is condemned.' And this law is followed to-day by nations whenever they carry on war with others, for now all vessels laden with unlawful merchandise are confiscated along with the merchandise."

† " But although this law of confiscating unlawful merchandise, together with the vessels, was very general among nations not only in olden times, but at the present day; nevertheless, there are examples where different agreements were made between nations."

ships themselves that carried contraband goods. He continues:

"Sed quemadmodum ejusmodi pacta ad exceptionem pertinent: ita facile patet, regulam istis non tolli, adeoque certi juris esse, ob merces illicitas naves etiam in commissum cadere."*

c. In later times the rigor of this procedure has been lessened. *Pratt on Contraband of War*, LXVIII., LXIX., refers to this topic as follows:

"It now only remains to consider the consequence of carrying contraband.

The first is, of course, the confiscation of the article itself, of which every case of condemnation affords an example.

By the ancient law of Europe the confiscation was also extended to the vessel, the medium of conveyance and instrument of offense (The *Ringende Jacob*, 1 C. Rob., 90; The *Mercurius*, 1 C. Rob., 288).

But in the modern practice of the Court of Admiralty a relaxation has been introduced and a milder rule has been adopted. Independent of the forfeiture of the article of contraband, the conveyance of it is, in general, only attended with loss of freight and condemnation in expenses of bringing it in together with the costs of suit (The *Sarah Christina*, 1 C. Rob., 242; The *Mercurius*, 1 C. Rob., 288, *Note;* The *Neutralitie*, 3 C. Rob., 297). * * *

This relaxation, however, is only extended to the property of such parties as may fairly be supposed to be free from all participation in the offence, the known ground on which it was introduced being the supposition that freights of noxious or doubtful articles might be taken without the knowledge of the owner (The *Elizabeth Catherina*, *Pratt on Contraband of War*, p. 115); where, therefore, in the case of the *De Vrow Anna Maria* (*Pratt on Contraband of War*, pp. 119, 122), the contraband goods were put on board the ship by the consent and privity of the owners, it also was included in the same sentence of condemnation."

See also The *Panama*, 176 U. S., 535.

* "But whatever exceptions these treaties show, yet it is very clear that the rule is not changed by them, but that it is undoubted law that ships incur condemation by reason of unlawful merchandise."

Though the vessel herself may not be condemned if captured, yet the transportation of contraband goods to a belligerent destination is not a lawful trade for a neutral vessel.

In the *Peterhoff, 5 Wallace, 28,* Chief Justice Chase said:

"We know of but two exceptions to the rule of free trade by neutrals with belligerents; the first is that there must be no violation of blockade or siege; and the second that there must be no conveyance of contraband to either belligerent" (p. 56).

"*The conveyance by neutrals to belligerents of contraband articles is always unlawful,* and such articles may always be seized during transit at sea" (p. 58).

The same doctrine has been previously laid down in the *Bermuda,* 3 Wall., 514, 551: "So, too, *except goods contraband of war,* or conveyed with intent to violate a blockade, neutrals may transport to belligerents whatever belligerents may agree to take.

Davis, International Law (p. 339), says:

"International law declares the act of transporting contraband, and breach of blockade, to be unlawful, and denounces the penalty of confiscation upon the goods, and in some cases upon the ships engaged in such illicit trade."

The same author further states (p. 353):

"The conveyance of contraband of war is an offense against the law of nations."

Owen, Declaration of War (p. 187), announces a similar principle:

"Neutrals possess, as we have seen, the right to ship warlike stores as between themselves, but they must not carry such articles to belligerents" (p. 183).

"A neutral vessel carrying contraband of war must on no account touch at an enemy's port" (*The Trende Sostre,* 6 C. Rob., 387).

The District Judge said on this point:

"The sulphur being generally regarded as contraband of war, and also within the express terms of the Spanish proclamation, a voyage through the Mediterranean, past the coast of Spain and through the Straits of Gibraltar would presumably be pecuniarily dangerous to the cargo, even though the vessel, as a neutral, might not be liable to condemnation as prize. In case of seizure, however, the shipowner would suffer from the considerable delay incident to the seizure though she were ultimately released" (fol. 943).

The Court of Appeals said as to this (p. 340):

"While the state of war continued unmodified, under the rules of international law, sulphur or brimstone shipped and owned as this was, was subject to seizure by war vessels of Spain on the high seas, a process which would involve the arrest of the neutral vessel carrying it wherever she might be, off the coast of Sicily, in the Straits of Gibraltar, or on the banks of Newfoundland, her enforced deviation from her voyage to a Spanish port and her detention there until a Spanish prize court should have determined the questions arising upon confiscation of the cargo."

d. If, therefore, there was no contract between the parties as to the carriage of contraband cargo, and obviously there was not, for the cargo was not known to be contraband when it was shipped, then the master was under no duty, as a common carrier or by contract, to carry the sulphur. He was in the position that he had on his ship the goods of a third party that he could not carry.

He was bound to take reasonable care of all the goods that had been entrusted to him, and he would have failed to discharge his duty in this respect if he had omitted to reland the sulphur (*Carver, Carriage by Sea*, 3d Ed., § 294). In *Nobel's Explosives* v. *Jenkins* [1896], 2 Queen's Bench, 326, where a master had followed a course similar to that adopted

by the master of the *Styria*, Mathew, *J.*, (p. 332) said:

" But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him " (See also *Holladay* v. *Kennard*, 12 Wall., 254, at p. 257).

He could do nothing more than put the contraband goods ashore under safe custody. It has never been claimed that the master discharged the sulphur in an improper manner as to the actual discharge, or that the warehouses in which it was stored were not proper and safe places for its reception.

The act of relanding and storing the sulphur was not a wrongful act. It was, indeed, the only thing he well could do. The Court of Appeals said (p. 344):

" Inasmuch as the master, where the contract was made in times of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of war had become contraband, we fail to see why he should not have the right to land such contraband cargo, with all proper precautions as to safe-keeping, thus leaving his ship free to discharge its obligations to innocent cargo without risk of delay by reason of an actual arrest which would be caused only by the presence of such contraband cargo."

The act of the master in relanding the sulphur " for facts of war " and " for your (their) own account and risk " as stated in his notice to the shippers of the cargo (fol. 427), together with his further notice to the shippers, after the sulphur had been unloaded, that the sulphur was in warehouse and could be obtained on payment of the expenses incurred (fol. 443), showed that the master regarded the contract for the carriage of the sulphur as at an end. The sulphur was then at the disposal of the

shippers or its owners, subject to the payment of the expense incurred with respect to it. It was not necessary for the master to state specifically that the contract was abrogated because of the war and the change in the character of the sulphur from lawful to unlawful cargo, though he did so in effect. It was sufficient that by his acts no doubt was left in the minds of the shippers and of the consignees of the sulphur that it would remain where it was in Sicily, so far as the master was concerned. If the owners wished to have the sulphur carried forward it would necessarily be under some other contract than that the parties thought they had made here.

If there was no contract between the parties at the time the sulphur was relanded, it follows conclusively that the libels should have been dismissed. There was no subsequent act by the parties that formed a contract between them. Their relations to each other were as if no contract had ever been. The contract the parties had made was for the carriage of lawful cargo, and there was nothing on which the contract could act.

It was suggested on the argument in the court below that the sulphur was loaded and the bills of lading were given at a time when whatever danger existed on account of the war was known to the master. The answer of the Court to this was (p. 339):

"There is no evidence in the case which will warrant a finding that the captain knew that war had been declared before he shipped libelant's sulphur and signed bills of lading therefor."

This finding it is submitted should be conclusive on the fact. The evidence, indeed, shows that it was impossible that the captain could have had any such knowledge. The bill of lading of the sulphur for Parsons was signed on April 21st (fol. 401); Malcolmson's bills of lading were signed on April 22d and 24th, respectively (fol. 403); that of Morgan was

signed on April 23d (fol. 399), and that of Munroe on April 24th (fol. 400).

All the sulphur had been loaded on board by April 24th (*ante*, p 6).

The first overt act of war took place on April 22d, on the capture of the Spanish merchant steamship "*Buena Ventura*," by the United States war vessel (The *Buena Ventura*, 175 U. S., 384). Whether or not this fact was known to the master, and there is no evidence in the record that it was, it could not have been sufficient notice to him that war existed so that the sulphur became contraband cargo. It might well have been that the capture of this vessel would be disavowed by the United States, and such amends made as would close the incident. The capture of the steamship did not necessarily mean war.

No acts of hostility had been committed by Spain prior to April 25th, and the international status was so uncertain that on that day the President, in a message to Congress, after stating that diplomatic relations between the two governments had been broken off, and that he had ordered a blockade of certain ports in Cuba, added:

"In view of the measures so taken, and with a view to the adoption of such other measures as may be necessary to enable me to carry out the expressed will of the Congress of the United States in the premises, I now recommend to your Honorable body the adoption of a joint resolution declaring that a state of war exists between the United States of America and the Kingdom of Spain, and I urge speedy action thereon, to the end that the definition of the international status of the United States as a belligerent power may be made known and the assertion of all its rights and the maintenance of all its duties in the conduct of a public war may be assured" (*Messages and Papers of the Presidents*, Vol. 10, p. 154).

No declaration of war was made on either side until April 25th. On that date the Queen Regent of Spain issued her proclamation declaring war, and the Congress passed and the President approved the

act declaring that war existed between the United States and Spain, and that it had existed since April 21st (*ante*, *p.* 8). The fact, however, that Congress regarded the war as having existed several days prior to the official declaration of war cannot charge the master with knowledge of such fact.

It may well be that it was a matter of common knowledge, when the sulphur was being loaded, that relations between the United States and Spain were strained, but the captain was in no position to foretell the course of events, and so refuse to accept the sulphur on the ground that it would shortly become contraband and unlawful cargo.

If, however, when the sulphur did become unlawful cargo, the master was justified in putting it ashore and landing it then it would follow that all expenses incurred in consequence with respect to the sulphur should fall on the sulphur itself and not on the ship. Under the decision of the District Court the ship had to bear those charges of relanding and of storage. The Court of Appeals held that the sulphur should pay all the expenses up to the 6th of May and the ship should pay those after that date(p. 348).

e. The rule that the contract of carriage is dissolved, where by reason of the outbreak of war the cargo has become contraband and subject to capture, is approved and followed under many of the maritime codes.

In the German Code (Art. 629) it is provided: "Either party can withdraw from the contract without being liable for damages * * * when, before the commencement of the voyage, a war has been declared, in consequence of which the vessel, or the goods to be shipped according to the contract of affreightment, or both, can no longer be considered free, and would be liable to risk of capture" (*Raikes, Mar. Code of Ger. Empire*, London, 1900, p. 38).

The Code of Holland (Art. 500) provides: "Either party may rescind a contract of affreightment, if, before the voyage commences, a

war breaks out in consequence of which the ship and cargo, or either of them, cannot be considered as neutral property. * * * If the cargo alone ceases to be neutral, the shipper pays the shipowner all the disbursements he has necessarily made in preparing for the voyage, and the wages and victualling of the crew up to the date at which the contract was rescinded, or cargo which had been loaded was discharged" (*Raikes, Mar. Codes of Holland & Belgium*, London, 1898, p. 42).

Other codes provide in general terms that if the sailing of the ship for the port of distribution is stopped by *force majeur*, war, blockade, or prohibition of trade by an act of Government, the contract of affreightment is rescinded (*Italy*, Art. 551, *Raikes, Code of Italy* p. 30; *Belgium, Art.* 90; *Raikes, Codes of Holland and Belgium*, p. 149; *Spain, Art.* 690; *Portugal, Art.* 547; *Raikes, Codes of Spain and Portugal*, pp. 47, 154; *France, Art.* 276; 2 *Valroger*, p. 231).

Valroger remarks (§ 710) that in consequence of the declaration of war between France and Germany, the French Courts held that contracts of affreightment for Baltic and North Sea ports were rescinded, though the ports of destination were not in dependencies of Germany; the reasons being, apparently, that the vessels in proceeding to their ports of discharge would be virtually within the power of the Germans and easily subject to capture.

Valroger further states (§ 711) that it is difficult, in his view, to deny the right of rescission, though there be no general interdiction of commerce, if the freighting arrangement relates to a specific kind of goods, and the carriage of such goods is prohibited by *force majeur*. *

* In the *Consulat de la Mer* the following provision is found:

"Cependant un patron peut s'excuser de faire le voyage pour quatre cause, savoir: pour maladie, pour se marier, pour aller en pélerinage, s'il en avait fait le voeu avant de fréter son naivre, et par empêchement de l'autorité publique" (2 *Pardessus, Us et Coutumes de la Mer*, p. 165).

Desjardins, Vol. III., pp. 505, 506, comments on the French law to the same effect as Valroger. He says:

"There is, it may be supposed, a French vessel destined for a Russian port in the Baltic; France is at war with Denmark and with Germany. It is certain, if the contract is carried out, that the ship will be captured by one power or the other. Could the freighter, under those conditions, constrain the owner to give the vessel into this service or recover damages for his refusal? In the first place, it would be iniquitous. Then, again, Art. 276, though it provides specially for the case of an interdiction of commerce, does not exclude other cases of *force majeur* which indefinitely postpone performance of the contract. * * * The Judge has a wider latitude. He decides not only according to the text of Art. 276, which deals with another question, but also on general principles of law; if he determines, as a fact, that the execution of the contract has been indefinitely postponed he must decide that the owner is discharged from his obligation."

The Court of Appeals has decided that the outbreak of war, and the declaration that sulphur was contraband, fairly presented to the mind of the master a case in which he should have assumed that the obstacle to the performance of his agreement to transport the sulphur would probably continue for an indefinite time; and that, accordingly, he did right to unload the sulphur when he did (pp. 344–345). That being so, the Court should have found, further, that the agreement to carry it was discharged, and could not again be revived by the advent of new conditions, which at a later time made it possible to reload or transship the goods.

II.

If it should be considered that a contract existed under the bills of lading to carry the sulphur after it became contraband of war then the master was justified by the provisions of the bills of lading in relanding the sulphur and storing it at Port Empedocle.

It has been contended in the previous point that the outbreak of war, as a result of which the sulphur became contraband and unlawful cargo, rendered the agreement to carry sulphur, as evidenced by the bills of lading, null and of no effect whatever by removing from the purview of it the subject matter on which only it could act. If, however, it should be considered that the facts of war did not altogether abrogate the agreement, yet it is contended that by the very terms of the bills of lading the master was justified in relanding the contraband cargo and storing it at Port Empedocle for the shipper's account.

The answers in these cases set up four separate defenses as justification for the acts of the master in relanding the sulphur and storing it at Port Empedocle and failing to deliver it at New York on the arrival of the *Styria* in June, 1898. The defenses in all the cases are the same, and will be considered in order.

a. The conduct of the master was justified under the clause in the bill of lading, "Restraints of Princes and Rulers of People * * * excepted."

The last of the sulphur had been loaded in the *Styria* on April 24 (fols. 489-490). The bills of lading had all been delivered prior to or on that day (fols. 399-404), and the vessel was then ready to sail.

As the Court of Appeals said (p. 339), "There is no evidence in the case which will warrant a finding that the captain knew that war had been declared

before he shipped libelant's sulphur and signed bills of lading therefor." On April 25, however, the Queen Regent of Spain had issued her proclamation declaring that war existed between Spain and the United States; that sulphur was contraband and was subject to *confiscation* by Spain *under whatever flag* it should be carried, and that the Ministers of State and Marine were charged to see the fulfillment of the royal decree and to give the orders necessary for its execution (fols. 871, 814). It was on the same day that the Congress at Washington had passed and the President had approved the declaration of war with Spain (*ante*, p 8).

On April 22 a Spanish merchant steamship had been captured by the United States warships (*The Buena Ventura*, 175 U. S., 384), and at that time diplomatic relations between the two countries had reached the breaking point.

When it became known that a state of war actually existed between Spain and the United States, the managing owners on or before April 26th telegraphed to the master to discharge the sulphur (fols. 412, 495, 515).

The master well knew that sulphur was used in making gunpowder (fol. 453), and he thought, of course, that it was contraband (fols. 470 and 471), quite irrespective of any proclamation by the Queen Regent of Spain, and he knew, also, when he relanded the sulphur that war existed between the United States and Spain (fol. 461). Indeed, as the Court of Appeals say (p. 345): "We should have some doubts as to the efficiency of a master for international commerce who did not know that sulphur was contraband of war. It certainly should be a safe assumption for the master of a neutral vessel to make that he cannot carry such cargo to the ports of one belligerent without risking its seizure by the other."

The master testified that he had heard that a blockade of New York was going on (fol. 462), and that it was reported in Sicily that Spanish men

of war were looking for ships along the coast of Spain (fol. 493). He believed this report (fol. 494). He also testified that the newspapers in Sicily reported that a ship laden with sulphur had been captured by a Spanish man of war (fols. 501, 523).

Spain had given notice to the world that her power would be exercised to search all vessels on the high seas for and to seize all sulphur so found The course of the *Styria* to New York would take her close along the Spanish coast through the narrow straits of Gibraltar, having Spanish territory on both sides, and near the Spanish naval base at Cadiz (fol. 413).

Were these facts and the circumstances in which the master was situated sufficient to cause such a reasonable apprehension of capture in "the mind of a master of ordinary courage, judgment and experience" (Sir R. Phillimore in the *San Roman*, L. R., 3 Adm. & Ecc., 593) as to constitute a "Restraint of Princes and Rulers of People?"

Carver, Carriage by Sea (3d ed.), § 82, p. 96, dealing with the exception, says:

"'Restraints of princes, rulers and peoples' covers any forcible interference with the voyage or adventure at the hands of the constituted government, or ruling power of any country (*Nesbitt* v. *Lushington*, 4 T. R., 783; *Aubert* v. *Gray*, 32 L. J., Q. B., 50), whether done by it as an enemy of the State to which the ship belongs, or not. For example, *orders of government* prohibiting or restricting the exportation or landing of goods; quarantine regulations, embargoes or restrictions on particular ships; blockades; confiscations of goods as *contraband*, and so forth. And the restraint may have been by acts which were not directed against the ship or goods; they may have been affected indirectly (*Rodoconachi* v. *Elliott*, L. R., 9 C. P., 518). * * *

"Where a blockade by the French actually existed at Hamburg, the place to which the cargo was to be carried, this exception excused the shipowner's refusal to take it on board (*Geipel* v. *Smith*, L. R., 7 Q. B., 404).

"The exception does not protect the owner when the master has acted unskillfully or imprudently or with an unreasonable degree of apprehension. But it is not limited to restraints actually exerted by force. *The master is entitled and bound to use caution in avoiding the risk of actual seizure;* and deviations and delays on the voyage prudently made with that object are excused by the clause (*The San Roman*, L. R., 5 P. C., 301; *The Teutonia*, L. R., 4 P. C., 171)."

In *Abbott on Shipping* (13th ed., pp. 503, 504), the rule with regard to this clause is stated as follows:

Mr. Justice Byles, in *Russell* v. *Niemann*, 34 L. J., C. P., 10, 14, thus summed up the above and kindred exceptions: "The 'King's enemies' means the enemies of the carrier's sovereign, whatever title he may enjoy, whether queen, emperor, president, duke, doge or aristocratic assembly; and lest there should be anything left out, 'restraint of princes' I should conceive, comprehends every case of interruption by lawful authority. * * * So that those three exceptions, the king's enemies, restraint of princes and perils of the sea, seen to include every species of *vis major;* and by the technical rules of our law, it is necessary to guard against incidents of this nature by express words. * * *

To *constitute restraint within the meaning of this exception, it is not essential that there should be physical seizure, or arrest of ship, or goods.* Thus in *Rodoconachi* v. *Elliott*, L. R., 9 C. P., 518 (1874), it was held that silk insured from Shanghai to London *via* Marseilles, which was detained in Paris during the siege by the German army, was lost, within the meaning of the policy, by restraint of kings and princes, because "the goods were as effectually prevented from coming out" (of Paris) "as if they had been actually seized by the German army" (at p. 522). And in *Geipel* v. *Smith*, L. R., 7 Q. B., 404 (1872), it was held that the defendant, who had contracted to load a cargo of coal for the plaintiff, and carry it to Hamburg, was excused even sending his ship to load the cargo, as since the making of the charter-party war had broken out between France and Germany, and Hamburg had been blockaded by the French fleet.

Scrutton on Charter Parties and Bills of Lading (4th ed.), p. 177, says:

"This exception applies to forcible interferences by a State or the government of a country taking possession of the goods by a strong hand, such as arrest, embargoes (*Rotch* v. *Edie* [1795], 6 T. R., 413), or blockades (*Geipel* v. *Smith* (1872), L. R., 7 Q. B., 404); *to government action for other purposes, indirectly resulting in the detention of the goods* (*Rodoconachi* v. *Elliott* [1874], L. R., 9 C. P., 518); to the decrees of a Prize Court after capture (*Stringer* v. *English & Scottish Mar. Ins. Co.* [1870], L. R., 5 Q. B., 599); or to embargoes imposed by the government of the shipowner (*Aubert* v. *Gray* [1861], 3 B. & S., 163); *or to the risk of such proceedings* (*Nobel's Explosives* v. *Jenkins* [1896], 2 Q. B., 326)."

The statements from the books show that an actual physical taking of the goods is not necessary to constitute a restraint of princes. The adjudicated cases fully support this proposition.

In *Rodoconachi* v. *Elliott* (1874), L. R., 9 C. P., 518, goods in transit from China to England had reached Paris at the beginning of the siege of the city by the German army. The usual, but not the only route of forwarding goods from Paris to England was by way of Boulogne. All communication between Paris and Boulogne had been cut off. While the goods remained at Paris the German army took possession of all the roads leading out of Paris and completely besieged the city. It was held by the Exchequer Chamber that the goods were prevented from leaving Paris, and that there was a constructive total loss within the terms of a policy which insured against restraints of kings and princes.

BRAMWELL, *B.*, said at page 522:

"But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was

there any specific or published order prohibiting the transport of goods from the beseiged city; but the city in which the goods were was beseiged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army."

In *Geipel & Smith* (1872), L. R., 7 Q. B., 404, the defendants had agreed to load a cargo of coal in England and sail to Hamburg. After the charter-party had been made, war broke out between France and Germany and the port of Hamburg was blockaded by the French fleet. The defendants refused to carry out the charter-party relying, on an exception of restraints of princes and rulers. It was held that they were justified in their refusal.

COCKBURN, *C. J.*, said (p. 410):

"Is a blockade a restraint of princes? I think it is * * * provided the restraint is effective; and in the eye of the law a blockade is effective if the enemy's ships are in such numbers and position as to render the running of a blockade a matter of danger, although some vessels may succeed in getting through. In such a case the obstacle arises from an act of state of one of the belligerent sovereigns, and consequently constitutes a restraint of princes."

As to the contention that the defendants were bound to be in readiness to carry the cargo as soon as the blockade should be raised, COCKBURN, *C. J.*, said at (p. 410):

"But it would be monstrous to say that in such case the parties must wait, for the obligation must be mutual—till the restraint be taken off—the shipper with cargo which might be perishable or its market value destroyed—the shipowner with his ship lying idle, possibly rotting."

LUSH, *J.*, said (p. 414): "A state of war must be presumed to be likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this."

The case of *Nobel's Explosives Co.* v. *Jenkins* (1896), 2 Q. B., 326, although distinguished by the District Court by the brief statement that "the facts were otherwise," is, in fact, as we submit, very much in point. In that case the plaintiff's goods, which were dynamite and contraband of war, had been placed upon a general ship of the defendants for carriage from London to Yokohama under a bill of lading containing clauses almost identical in form with the above clauses (*a*) and (*b*) of the *Styria's* bills of lading. The ship, as in this case, also carried non-contraband goods belonging to other shippers. In the course of the voyage she arrived at Hong Kong, and while there war was declared between China and Japan. There were at the time Chinese war vessels in and around the port of Hong Kong, and it was found that if the master had attempted to sail thence with the plaintiff's goods on board there would have been danger of their being seized and confiscated. The master cabled to his owners for advice, and they instructed him to land the cargo at Hong Kong; this was done. The plaintiffs forwarded the dynamite by another steamer several months later. They then brought an action to recover from the defendants the amount of freight which they had to pay for so forwarding, and also for the other expenses for relanding and reshipping the cargo at Hong Kong.

It was held: (1) that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the exception; (2) that such risk of seizure on the voyage between Hong Kong and Yokohama rendered the "entering of or discharging in the port" of Yokohama unsafe within the meaning of the special clause; and (3) that the master's duty to take care of the cargo justified him, apart from any exception in the bill of lading, in landing the plaintiff's goods where he did.

Mathew, *J.*, in the course of his judgment, discussed the matters now before the Court, as follows:

"The main ground of defense was the exception in the bill of lading of 'restraint of princes, rulers or people.' A large body of evidence was laid before me to show that if the vessel sailed with the goods on board she would, in all probability, be stopped and searched. It was certain in that case that the goods would have been confiscated, and quite uncertain what course the captors would take with the ship and the rest of the cargo. I am satisfied that if the master had continued the voyage with the goods on board he would have been acting recklessly. It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel* v. *Smith*, L. R., 7 Q. B., 404, and *Rodocanachi* v. *Elliott*, L. R., 9 C. P., 518. The goods were as effectually stopped at Hong Kong as if there had been an express order from the Chinese Government that contraband of war should be landed. The analogy of a restraint by a blockade or embargo seems to me sufficiently close. The warships of the Chinese Government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely. The restraint was not temporary, as was contended by the plaintiffs' counsel. There was no reason to expect that the obstacle in the way of the vessel could be removed in any reasonable time. I find that the captain in refusing to carry the goods farther acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the meaning of the exception.

"But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated.

In the words of Willes, *J.*, in *Notare* v. *Henderson*, L. R., 7 Q. B., 225, at p. 237, 'a fair allowance ought to be made for the difficulty in which the master may be involved * * * The place, the season—the opportunity and means at hand, the interests of other persons concerned in the adventure and whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay and inconvenience must be taken into account. I am of opinion that the course taken by the captain in landing the goods and landing them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo" (p. 330).

If the master was justified in believing that there was reasonable probability that the *Styria* would be stopped and searched by the war vessels of Spain if she attempted to carry the sulphur to New York, then, as in *Noble's Explosives* v. *Jenkins* (*supra*) there was a restraint of princes and rulers and the ship was justified in refusing to carry the sulphur.

Sir Robert Phillimore stated the rule in the *San Roman*, L. R., 3 Adm. & Ecc., 593, as follows:

"According to both (the laws of England and Germany) an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience, would justify delay."

There can be no doubt that there was such a real risk; as the Court of Appeals said (p. 341):

"It seems manifest that, upon the outbreak of war, a voyage with contraband on board to the port of one of the belligerents might fairly be regarded as a risky piece of business. The suggestion made upon the argument that the naval power of Spain was not such as would induce a 'man of ordinary courage, judgment and experience' to hesitate to

proceed is of no weight. We may not attribute to the captain of the *Styria* knowledge gained after the event; and, indeed, this Court is not advised of any historical facts which would warrant the conclusion that it was not entirely within the power of Spain during the first few months of the war to arrest and search every vessel westward bound through the Straits of Gibraltar, and picking her way along by the lighthouses on the Spanish coast."

It can make no difference whether the zone of danger, through which the vessel would have to pass to deliver the cargo, was wide or narrow. This danger may exist at any part of the voyage, and if it is unavoidable it is equally a restraint of princes and rulers, whether it exist at the port of loading or at the contemplated port of discharge. To quote the language of the Court of Appeals (at p. 342):

"There is no logical difference between a restraint of princes and rulers exercised by a cruiser with power to visit, search and seize lying two leagues off Cape Empedocle, and that exercised by a half-dozen cruisers patrolling a narrow strait through which, if the voyage be made, the vessel must pass. Under such circumstances the owner of contraband cargo (loaded as this was before war broke out) could with reason insist that it would be gross negligence on the part of the ship to bring his cargo forward. Moreover, it would certainly be unreasonable to require the ship to remain in port with the contraband cargo on board until the war should cease, a period of months, possibly years. The owners of other cargo not contraband have rights as much, if not more entitled to consideration than those of the owners who have been unfortunate enough to ship the cargo which has produced the risk."

If the carrier has reasonable grounds for believing that his voyage will be attended with danger to the cargo, whether by reason of restraint of princes or otherwise, it is clearly his duty to exercise due care to avoid loss. For breach of this duty he will be held liable.

The leading case on this subject in this country is that of *Holladay* v. *Kennard* (1871), 12 Wall., 254.

In that case the defendant's servant, an express messenger, in charge of a stage on a line passing through Colorado Territory, in January, 1865, was warned of the presence of a hostile force in the neighborhood, and advised to remain at a military post. Disregarding this information, he left the military post, and subsequently the stage was captured by the Indians, who rifled the express company's safe which contained the plaintiff's property. The Court charged the jury that the attack of the Indians was that of the public enemy. The question left to the jury was whether or not the messenger used due care to avoid a loss by the enemies. The jury found for the plaintiff, and the judgment was affirmed.

Mr. Justice Bradley, in delivering the opinion of the Court (at p. 257), said:

"The effect of the charge as delivered was that although a common carrier is not responsible for the destruction or loss of goods by the act of a public enemy, he is nevertheless bound to use due diligence to prevent such destruction or loss. If his negligence or want of proper attention contributed thereto he would be liable therefor. It was not necessary in this case that there should have been fraud or collusion with the Indians or willful negligence on the part of the defendant or his agents to render him liable. Supposing the express agent to have been a suitable person for the duty he had to perform, all that the charge *exacted* of him was such care and attention as he naturally would have taken of his own goods, that is, ordinary care and attention.

Surely the law requires this degree of diligence, and would make the defendant liable for the want of it, that is, for ordinary negligence. Whether such negligence was or was not proved, was fairly left to the jury; * * * (p. 259), the Court took the pains to warn the jury that the result is not always a true criterion whether a man pursued a prudent course or not."

Substantially the same rule was adopted in the English cases that arose during the Franco Prussian

War, where vessels were uniformly held justified in taking steps by deviations and delays to avoid the risk of capture (The *Express*, L. R., 3 A. & E., 597; *The San Roman*, L. R., 3 A. & E., 583, 593; *Affd.*, L. R., 5 P. C., 301; *The Teutonia*, L. R., 4 P. C., 171; *Cargo* v. *Argos*, L. R., 5 P. C., 134; *Geipel* v. *Smith*, L. R., 7 Q. B., 404; see also *Bruce* v. *Nicolopulo*, 11 Exch., 129; *Exposito* v. *Bowden*, 7 E. & B., 763).

In the case of the *Express* (*supra*), a German vessel had loaded a cargo at Taganrog for Falmouth, England. On arriving at Algesiras, the master was informed of the outbreak of war between the North German Confederation and France, and was advised by the North German Consul at Gibraltar that the master would incur risk of capture from French men of war if he proceeded to sea. In consequence, the *Express* deviated and sailed to the port of Gibraltar, where she remained until the close of the war. No enemy cruisers were actually seen nor were there any in the immediate neighborhood. Action was brought against the ship by the owners of the cargo for damage to the cargo by delay and for loss of profit. In giving judgment for the ship *Sir R. Phillimore*, said (p. 605):

"I do not assent to the proposition that if the chances of capture and escape were equal the master was bound to proceed; but I think the former preponderated. It was contended that there must be what was called 'an actual operative restraint.' This would seem to indicate that nothing short of a blockade would justify the delay of the vessel to sail. I am not of this opinion. I think a reasonable prudent man, exercising due discretion and fortitude, would not have sailed, thereby exposing his ship to capture at that time."

In most of the English cases, the danger of capture was to the vessel itself, owing to its enemy character; accordingly, the steps taken to avoid it were putting into neutral ports and delaying the voyage until peace was declared, or the danger dis-

appeared. The damages in most cases were for delay. But in all cases the question was whether the steps taken were reasonable under the circumstances.

If, then, there was such a reasonable apprehension of seizure in the mind of the master as amounted to a restraint of princes, as both Courts below have found, it would seem that there was ample justification for the initial act of the master in relanding and storing the contraband cargo. The Court of Appeals so held, indeed. The opinion states (p. 344):

"Inasmuch as the master, where the contract was made in times of peace, could properly decline to carry forward a cargo which by the subsequent breaking out of a war had become contraband, we fail to see why he should not have the right to land such contraband cargo, with all proper precautions as to safe keeping, thus leaving his ship free to discharge its obligations to innocent cargo without risk of delay by reason of an actual arrest which would be caused only by the presence of such contraband cargo. The ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she has never entered."

But the District Court thought that the discharge of the cargo on April 27th was too hasty and that the master should have waited a reasonable period for satisfactory assurances that sulphur would be excepted from the list of contraband.

It is submitted that this cannot be the law. The circumstances on April 27th disclosed nothing that would have caused a reasonable man to believe that Spain would voluntarily permit the passage from Italy to the United States of so important a sinew of war as sulphur. What Spain did do from motives of policy or otherwise must be immaterial. The master might well have thought that sulphur would remain contraband so long as the war should last and the end of the war that had just begun was a thing no man could tell. It cannot be doubted

that the owners of the other cargo already shipped at Trieste would have had a just cause of complaint if they had been subjected to a delay of several weeks solely for the benefit of certain other cargo which was not lawful merchandise. Such delay as actually was experienced was unavoidable owing to the change effected in the character of the sulphur by the course of events. Possibly also the waiting cargo of about 40,000 boxes of fruit (fols. 480, 518) at Messina might have been damaged by the master's delay though it should have been determined by the District Court to be for a reasonable period only. If "the master as the agent for all concerned is still bound to a prudent regard for the interests of the cargo and 'must endeavor to hold the balance evenly' between ship and cargo, when their interests conflict" as the District Court maintained (fol. 942), at least the master must consider the interests of all the cargo, and not merely those of the contraband goods.

Much reliance apparently was placed by that Court on the case of the *Julia Blake*, 107 U. S., 418, but it is submitted that the application was altogether misguided.

The *Julia Blake* was a case where the master of a vessel which put into St. Thomas for repairs, issued a bottomry bond on the ship *and cargo* for the expenses of the repairs without communicating with the shipper or consignee, and without ascertaining whether the latter wished to take delivery at the port of refuge, or to have his cargo forwarded by another vessel. On a finding that either of these courses would have been of greater advantage to the cargo owner than to have had the cargo bottomried for ship's repairs, the Court decided that the master had acted improperly in hypothecating the cargo for the repairs to the ship without first communicating with the owner of the cargo. The Court said that the master acted in such a case as the agent for the owner of the cargo as well as for the shipowners.

This was a case where the owner of the goods had an option either to forward the goods by another ship or to contribute to the repairs of the "Julia Blake," so that the goods might be carried on that vessel. The action of the master deprived him of his rights to exercise this option.

In the present case, however, the owner of the sulphur had no option whatever. Under no circumstances could the *Styria* carry the sulphur forward at that time, nor would it have been fair either to the ship herself or to the non-contraband cargo to have had her wait at Port Empedocle until the war should be over.

The relanding of the sulphur did not prejudice its owners in any respect as to their rights to have the cargo forwarded by any other available means, and it is impossible to see what other course could have been followed out by the master with regard to the sulphur, even if he had been able to get in direct communication with the consignees.

The reference to the *Spartan* (25 Fed., 44, 56-58) is to some general remarks by the same Judge on the duties of the master with relation to the cargo. This is true also with respect to *L'Amerique* (35 Fed., 835, 844-846), cited by the District Court. The case of *A Cargo ex Argos*, L. R., 5 P. C., 134, 165, also contains a discussion of the duties of the master toward the ship and the cargo in unforeseen emergencies.

These cases hold that the master, in the language of Brown, *J.*, in *L'Amerique* (35 Fed., 845), "is not authorized to sacrifice the ship to the cargo, nor the cargo to the ship."

Nobel's Explosives v. *Jenkins* (1896) (2 Q. B., 326, 331-332), also cited by the District Court in this connection, although elsewhere (fol. 948) the Court says of it that "the facts were otherwise," is referred to at p. 42 of this brief.

None of these cases is authority for the suggestion that the master was not justified in relanding the sulphur. There was no question of sacrifice of the

cargo to the ship. The cargo had become contraband, and the ship could not lawfully carry it to New York. If the master had sailed with the sulphur there would have been a possible sacrifice of the ship and the non-contraband cargo to the sulphur.

The remaining case relied on by the District Court is the *San Roman*, L. R., 3 Adm. and Eccl., 583. In that case the vessel itself would have been subject to seizure if she had proceeded on her voyage, and it was held that the ship owner was justified in waiting till the danger to the ship was past. This is a very different proposition from the suggestion of the District Court that the ship *must* wait where there is a supposed danger to the cargo.

b. The conduct of the master was justified under the clause in the bill of lading which provided:

"In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict, the master shall consider it unsafe for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the post office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense and the master and owners discharged from all responsibility" (fols. 756, 757).

The circumstances which the claimant contends amounted to a restraint of princes, have been considered in the first part of this point.

It was to avoid any possible uncertainty as to the proper and lawful course that the master should take in the event of the extraordinary circumstances that might, and in fact, did occur, that the above clause was inserted.

It contains no condition as to time. It gave the master the widest latitude of discretion to land

the goods whenever circumstances arose which in his judgment made it dangerous for him to proceed with the cargo to the port of destination and land it there.

In accepting the bill of lading the shipper or other agent of the property carried, expressly accepted and agreed to all its stipulations, exceptions and conditions (fol. 759).

It is not necessary for the claimant to contend that the shipper had consented to an arbitrary decision by the master. That situation is not presented here. But there can be no doubt that the shippers and their successors in interest did agree to a reasonable exercise of discretion by the master. The entire testimony in this case shows that the decision of the master was an honest one, made in the utmost good faith and with the intention of conserving the best interests of all. The master had heard and he believed that Spanish men-of-war were on the lookout for ships on the coast of Spain (fols. 493, 494), and he had also heard that New York was blockaded (fol. 462); the newspapers in Sicily reported that a ship laden with sulphur had been captured by Spain (fols. 501, 523).

If, with this information, the master had sailed and had been captured, it cannot be doubted that the owners of the non-contraband cargo and also of the sulphur would have had just cause to complain that the master had not acted prudently. There can be as little doubt that these same libelants who now complain because the master exercised his judgment one way, would have been equally clamorous against him if he had taken the sulphur, and the result had gone against them.

In the language of Mr. Justice Bradley in *Holladay* v. *Kennard* (1871), 12 Wall., 254, *ante* p. :

"The result is not always a true criterion whether a man pursued a prudent course or not."

It was contended in the Court below that this special clause in the bill of lading had no application

to the facts in this case because it was not unsafe actually to enter the port of discharge or to discharge cargo there after the port had been entered.

The decision in the case of *Noble's Explosives* v. *Jenkins* (1896), (2 Q. B., 326), is a complete answer to any such narrow construction of the language of the special clause. In that case, Mathew, *J.*, held that under this clause the vessel was justified in relanding the goods at Hong Kong because it was unsafe in the master's opinion to proceed on a voyage to Yokohama, Mathew, *J.*, said (at p. 331):

"There was a further clause in the bill of lading upon which the defendants relied, and which seems to me to afford a further answer to the plaintiffs' claim, which clause is as follows: 'If the entry of or discharging in the port of discharge shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods.' It was said that this clause was only intended to apply where difficulties arose upon the vessel's arrival at the port of destination. But I can see no ground for this narrow construction. The object was to enable the master to guard against obstacles which might prevent his vessel from reaching her destination in due course. There is no reason to suppose that it was intended to limit his discretion to the case where the information reached him on his arrival off the port of destination."

In this respect, that case is on all fours with the present cases, for there was absolutely no evidence in the *Noble's* case that there was any danger at the port of Yokohama itself, nor that the discharge could not safely have been effected if only the vessel could have reached that port.

If the danger through which the master had to pass to discharge the cargo at New York had been located in the near vicinity of that port, although there may have been no blockade whatever of the port, it could not seriously be contended that the master would not have been justified under this

special clause if he had failed to take the cargo there. It can make no difference in principle if in fact the danger was removed to a considerable distance from the port of discharge, but yet in fact was one that the master necessarily would encounter if he made the voyage. Any fair reading of the language used in connection with the purpose that it is evident the framers of the clause must have had in mind, would determine that the master would be justified in declining to prosecute the voyage if the circumstances were such as to give him a reasonable apprehension that his voyage towards the port of discharge, however he might make it, would be accompanied with danger to his vessel or to the cargo.

If the decision of the master that it was unsafe to proceed on his voyage was an arbitrary one, and was one which a resonably prudent and careful master would not have made under the circumstances, doubtless the master could not claim the protection of the clause. If, however, the master reasonably did have such belief of danger, and yet had proceeded on his voyage, the owners of the non-contraband cargo and possibly the consignees of the contraband cargo would have had just cause for complaint that he was not possessed of such prudence as they had a right to expect of a responsible master of a steamship.

One other suggestion of the District Court may be considered in this connection. It was said by the Court (fol. 945):

"But taking the circumstances altogether, I am of the opinion * * * that the master was guided in that matter [of the discharge] by the telegram from Burrell & Son, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time. Had he been left to his own judgment, I do not think, upon the testimony, that he would have discharged the cargo—especially not at the time he did."

The fact that the master received instructions from the managing agents of the ship, and that he obeyed them, would not be sufficient to take the case out of the conditions mentioned in the above clause, especially where it appears that the master himself did not think that it would be safe to take the cargo.

In the case of *Noble's Explosive Company vs. Jenkins*, previously referred to (p. 42), the bill of lading contained a clause phrased in practically the same terms as the one here under consideration. The master telegraphed to his owners for advice, and, on receiving instructions from them, landed the cargo. It did not appear what the master's personal opinion was. Yet his action in landing the goods was held justified under this clause.

In this case the instruction from the owners came first, but it was in direct accord with the master's own judgment.

Captain Scopinich labored under considerable difficulty in his examination as he was speaking in a language which was foreign to him, and in which he did not have great facility. A fair reading of his testimony, however, shows conclusively that he did consider it unsafe to take the cargo.

His evidence is as follows:

"Q. What was the reason for putting it ashore?
Mr. Hill: Objected to.
A. I acted according to instructions.
Q. Why didn't you bring it on to New York?
Mr. Hill: Objected to.
A. In fact, I didn't bring it, because I could see through the newspapers that it was contraband of war, although I acted on the owner's instructions to land the goods; for I would never have sailed with such a cargo, because I might be caught here by the enemy—your enemies, I mean.
Q. You mean by Spain? A. Yes, of course. Those are your enemies now, I suppose.
Q. Did your course towards New York take you anywhere near Spain? A. By all means. You have got to go near Spain, within a few miles, to sight the light-houses" (fols. 411-413).

"Q. Do you know whether it was actually contraband or not?

Objected to.

A. I know that it is for to make gunpowder. Everybody knows that.

Q. Do you know whether the Spanish Government considers or holds it to be contraband?

Objected to.

A. Of course it did hold it, because they were making understandings between Rome and Madrid about excluding sulphur from being contraband of war" (fols. 453, 454).

"Q. The only reason why you put this sulphur out at Port Empedocle was that you had some fear of difficulties between Spain and the United States? A. The reasons that I put the cargo on shore—it was because it was to carry my instructions out.

Q. And who gave you those instructions? A. The managing owners.

Q. And who were they? Burrell? A. Burrell & Son.

Q. Then they knew what you were doing, did they? A. They knew that I was to carry out instructions.

Q. The fact that you intended to, and did, put this cargo of brimstone out of the ship was known to Burrell & Son, was it? A. That I was landing the same?

Q. Yes. A. Of course it was not.

Q. And you did it by their instructions? A. Of course.

Q. And the reasons you have given other than that reason are mere impressions of yours, are they? A. No. Only to carry out instructions, that is all. I do not act on my own judgment.

Q. Not at all? A. No.

Q. Then these statements that you have made to us about contraband of war, and negotiations between Spain and Italy, and war between the United States and Spain, are merely given us for information as to your feelings at the time, are they? A. Merely to carry out—not merely—to carry out the conditions of the bill of lading.

Q. What does that mean? A. That means that when the master thinks it unsafe to proceed, and so on. You may read it. * * *

"Q. You think that under the clause of the bill

of lading you had a right to put this sulphur out of the ship at Port Empedocle, do you? A. When the war broke out" (fols. 458, 460).

"Q. You said a little while ago, I believe, on your direct examination, that you thought that it was contraband of war? A. I thought it was contraband of war.

Q. Why? A. Because I had seen what the papers reported about sulphur.

Q. Do you mean to say that you did not inquire whether sulphur was contraband of war at all? A. If I did not inquire?

Q. Yes. A. But there was a talk in town that sulphur was contraband of war.

Q. Did you make any inquiries of any people in authority as to whether sulphur was contraband or not? A. Not officially.

Q. You mean you heard gossip on the Exchange and in brokers' offices about it? A. Yes.

Q. And for your part, as you knew that brimstone was used to make powder, you thought it must be contraband. Is that it? A. Of course.

Q. And that is about all there is to it? A. Yes.

Q. It was your own notion, that is all? A. Also I had seen it in the papers" (fols. 470-472).

"Q. Now, Captain, you say that you put this brimstone ashore on instructions of the managing owners? A. Yes, and also because I knew that the war was there, and I acted on the bill of lading clause.

Q. You have testified, haven't you, that all this you did by orders? A. No. The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deem it not safe to proceed with the cargo that was declared contraband of war.

Q. Do you want to change your testimony in that respect? A. No, I do not.

Q. Because you testified before that you were obeying orders? A. I said I acted on the owners' instructions, and also on the bill of lading clause.

Q. Won't you tell us what reason you had, other than the fact that there was a war, to consider it unsafe to enter, or attempt to enter, the port of New York? What other reason did you have besides? A. The reason that I had was that I was

passing close to Spain, and a man of war might stop me on my way.

Q. You didn't know anything about it except there was war? A. Yes.

Q. That is all? A. And then there was also in the newspapers, the Italian newspapers, that a man of war was there looking for ships" (fols. 491–494).

"Q. If you had not been instructed by the owners, would you not have waited to verify that before you discharged? A. Before I was instructed by the owners to sail with the sulphur I would have done so.

Q. And if they had not instructed you at all you would have waited to find out, wouldn't you, before you would have discharged the cargo? A. I don't know if I would; I couldn't tell you now what I would have thought over there.

Q. You could not tell what you would have done? A. No. It greatly depends how a man finds himself. Probably he would do a thing to-day and to morrow he would not do it.

Q. And you cannot carry yourself back so as to say what you would have done if you had not had instructions? A. No; I can't tell you now what I would have done then" (fols. 502, 503).

"Q. You did hear, didn't you, that vessels were sailing with sulphur? A. I didn't hear anything there. It is a small place; you don't get news. I seen in the papers that one had been captured; whether it was the truth I don't know" (fol. 523).

"Q. Did you, as a matter of fact, consider it safe to bring brimstone?

Objected to as immaterial, irrelevant and incompetent.

A. No, I did not think it safe. When you see in the papers the ships are stopped with sulphur you would not call it safe" (fol. 537).

"Q. But the day before you sailed, on the 7th, you did read in the papers that the Governments had come to an agreement—to an understanding? A. Yes; not to an understanding, not to a safe understanding, but a temporary understanding, you know.

Q. To the effect that sulphur temporarily would not be treated as contraband of war? A. Yes.

Q. In spite of the previous proclamation. That was so, was it not? A. Yes, but the papers said not officially confirmed, you see. That meant, of course, they could withdraw it any moment" (fols. 578, 579).

The master had no information on which he could rely safely prior to the date of the sailing from Port Empedocle that sulphur would be allowed by Spain to go free.

The position of the District Court seems to have been that if the master had waited until the 10th of May he would have had reasonable assurance that it would be safe to proceed on his voyage with the sulphur.

The Court said (fol. 946):

"Before he left Italy, although there was no formal publication of the exception of sulphur, there were such formal assurances coming from the Spanish government as left no reasonable apprehension of danger from sailing with a sulphur cargo. * * * By the 10th of May there was reasonable assurance that it would be safe to go on with the voyage and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time."

It is to be noted in this extract from the opinion of the District Court that while it is said that before the master left Italy there were assurances of safety, yet the date of such alleged assurance is given as the 10th of May. In fact, the master left Port Empedocle early on the morning of May 8th (fol. 447). If then the reasonable assurances were not received until May 10th, they were too late to come to the knowledge of the master. If, as has been contended hitherto, the master was not bound to wait after the sulphur had become unlawful merchandise, and the Court of Appeals have expressly held that he was not bound to wait any time whatever (p. 345), then on the finding of the District Judge that the assurances of safety of the sulphur were received on May 10th, there

could be no cause of complaint that the captain did not wait to get them.

The position of the Court of Appeals, on the other hand, was that while it may not have been the duty of the master "to delay action on the expectation that a belligerent would voluntarily abandon one of its weapons on no better assurance that such action would be taken than the statements of anonymous and irresponsible contributors to a newspaper published in a community which is extremely solicitous that such action be taken" (p. 347), yet they held that by May 6th the situation had changed and that the publication in a newspaper purporting to be from the Italian Minister of Agriculture, Industry and Commerce that the Spanish government had given notice to the commanders of its vessels to let sulphur pass free was an official declaration which the master should have accepted as sufficient, and that on receiving knowledge of this notice it was the master's duty to reship the sulphur, since the condition of affairs which made it contraband had ceased to exist (pp. 347-348).

This publication on May 6th was one of eight extracts from the journal of Sicily that have been offered in evidence as having come to the notice of the master. The newspaper is the same one that contained the "statements of anonymous and irresponsible contributors" to which the Court of Appeals referred (p. 347). Each issue of the paper covered two dates. It is impossible to state under which date of each issue the events were supposed to be recorded.

The first clipping was from the issue of the 24th and 25th of April, which stated that certain efforts had been made by merchants at Messina to induce the Italian government to secure the exclusion of brimstone from being considered contraband of war. (*Malcolmson's Ex. D 19*, p. 214).

The second, under date of the 26th and 27th of April, quoted another newspaper as confirming the fact that Spain included brimstone in the list of

contraband of war, but that the council of ministers had decided to try to induce Spain to revoke its decision (*Malcolmson's Ex. D 20*, p. 214).

The third, under date of the 27th and 28th of April, contained an inquiry from an Italian deputy of the Minister of Foreign Affairs whether the brimstone had been excluded from the list of contraband of war (*Malcolmson's Ex. D 21*, p. 214).

The fourth, under date of the 29th and 30th of April, stated that the Spanish government had not yet pronounced itself upon the Italian demand to exclude brimstone from the list of contraband of war; but that the Spanish Minister of Marine seemed decidedly averse to exclude brimstone; nevertheless, it stated that it was hoped that the Italian demand would be conceded (*Malcolmson's Ex. D 22*, p. 215).

The fifth, under date of the 1st and 2d of May, contained an absolute assurance from an anonymous person that the Spanish government had determined to exclude brimstone from the list of contraband of war. It also contained the state ment that the Official Gazette would publish the decision regarding brimstone, but that in the meantime the Spanish government had ordered the commanders of its ships to allow brimstone to pass free (*Malcolmson's Ex. D 23*, p. 215).

In point of fact, it does not appear that the decision regarding brimstone ever was published by Spain or in the Official Gazette.

The sixth clipping, under date of the 3d and 4th of May, stated that the Consulta had decided not to publish in the "Official Gazette" the Spanish government's decision regarding the exclusion of brimstone from contraband of war, but yet that the *Italian Minister* of the Interior had sent circulars to all the Prefects in Sicily informing them of the orders relative to the navigation of the cargoes of brimstone (*Malcolmson's Ex. D 24*, p. 216).

The seventh, under date of the 5th and 6th of May, was the notice which purported to have come

from the Italian Minister of Agriculture, Industry and Commerce. It was as follows:

"Chamber of Commerce, Palermo: I inform the Chamber of Commerce, for the useful information of merchants, that by the decree of April 23d of the Spanish government, are considered as contraband of war, arms, projectiles, fuses, powder, sulphur. * * * I would also state that in consequence of our request, the Spanish government has given notice to the commanders of its vessels to let sulphur pass free.

(Signed) COECO ORTU."

(*Malcomson's Ex. D 25*, p. 216.)

The eighth and last, under date of the 7th and 8th of May, stated that the Prefettura confirmed the statement that the exportation of sulphur might continue, and that the Spanish Government had officially declared in the circulars to the commandants of the ships that sulphur was not to be considered as contraband of war. It further stated that "An official and public declaration is lacking, but there is no doubt that sulphur will pass free" (*Malcomson's Ex. D 26*, p. 217).

It is to be noted that not one of these rumors or assurances purported to have come from a Spanish source. The assurance of the 6th of May, which the Court of Appeals called "an official declaration" (p. 348), was issued over the name of the Italian Minister of Commerce. Naturally it was for the interest of the Italians to continue to export sulphur, and to create the impression that it could be done with security to the carrying vessels. All statements emanating from Italian sources must be weighed with regard to that fact. In forming his judgment, the master did consider this circumstance, and also the further one that in the last issue of the paper that he saw prior to his sailing it appeared that an official and public declaration from Spain was still lacking.

The day the master sailed he saw a notice from the consul that there was a communication from the

Prefect that it was agreed between the two powers, Spain and Italy, that sulphur might go free; but the agreement was not given officially and was only a matter of verbal arrangement (fols. 532, 533, 575).

His judgment on this point, formed after long experience with Mediterranean peoples, was, "of course, the verbal arrangement you can't believe" (fol. 533).

The Spanish proclamation declaring sulphur to be contraband and giving public notice of the intention to confiscate it under any flag was a document of the most formal and official character. It was never modified by any declaration of the Spanish government officially promulgated, nor was there any official promulgation of any private agreement to exclude sulphur from the list of contraband by any other nation that may have been a party to such an agreement.

It now appears from the dispatch of May 10th from the British Foreign Office in reply to the inquiry of Burrell & Son, the managing agents of the vessel, that the Spanish Government stated that as a temporary measure the Naval Department had been ordered not to treat sulphur as contraband of war, but they laid stress on the fact that the measure was temporary only (*Styria Ex. D. 4*, p. 203). The date of these orders is not given.

This meant, of course, that the orders could be revoked at any moment. The master states that he so understood the situation and that the temporary agreement was not in his opinion a safe understanding for that reason (fol. 579).

It seems from the letter from the British Foreign Office to Messrs. Miller & Company, under date of July 8th, that this temporary measure not to treat sulphur as contraband of war was adopted by Spain on May 6th as a result of representations made by Breat Britain and Italy (*Styria Ex. D. 15*, p. 210), and that the Spanish Minister of Foreign Affairs had verbally stated this fact to the British and Italian Ambassadors at Madrid (*Styria Ex. D. 16*, p. 211).

It was not, however, until May 31st that it was stated by the Spanish Government that the temporary suspension of sulphur from the list of contraband of war would not be revoked without due notice (*Styria Exs. D. 10*, p. 207, *D. 12 and D. 13*, p. 208).

According to the letters from the United States Embassy at Rome and from the Assistant Secretary of the Department of State at Washington, it does not appear that any formal agreement was ever made between Spain and Italy regarding the removal of sulphur from contraband of war (*Malcolmson's Exs.*, 17 and 18, pp. 212, 213).

The very fact that on may 31st the Spanish Government announced that the temporary suspension of sulphur from the list of contraband would not be revoked without due notice gives rise to the almost conclusive inference that that Government did not feel that it would have been bound to give any notice whatever previously to that date, but that it might have revoked the suspension at will and seized any vessel that had sulphur on board, though such vessel had sailed in fancied security because of the early assurance of the Spanish Government. It matters not that the assurance never was revoked. It might have been, and Spain apparently reserved the right to do this arbitrarily. The master had to act in view of this contingency. The Court of Appeals suggests that if the Spanish Government had reconsidered its decision and seized sulphur ships the Italian Government would have had good grounds to claim indemnity, and in case of refusal would have had a *casus belli*. This may have been a very valuable right to the Italian Government, but it was not the practical kind of security on which the master would have been entitled to rest the interests of the owners of the ship and of the non-contraband cargo, who would have suffered great loss from the delay that would be consequent on a seizure of the vessel, if, indeed, that should be the extent of the loss.

It is doubtful whether the shipowners and the owners of innocent cargo would have been able to secure any substantial part of those rights which the Court of Appeals say Italy had. It is undoubted that they would not have been willing to accept this somewhat doubtful possibility of recoupment as a satisfaction of the master's duty and conduct toward them.

But it may be argued that the shippers of the sulphur were the parties who had the greatest interests at stake and that they protested against the relanding of the sulphur and would have assumed all risk of seizure if the master had sailed with contraband cargo.

According to the allegations in the libels the shippers had no interest in the sulphur at the time the protests were made. Whatever title, if any, they previously had, had been transferred to the libelants (fols. 770, 877, 898). Their protests, therefore, could have been no protection to the master in the event of seizure. They made no offer, indeed, to guarantee him against such risks nor against the loss that the ship and the non-contraband cargo would sustain in the event of seizure. One of the protests suggested that there was a modification of the original Spanish proclamation that sulphur was prohibited but admitted that an official and public declaration was wanting and yet protested because the master did not rely on the rumor of safety.

After the end of war, and in the peaceful security of its chambers, a court may look back on the events of the time and find that they were fraught with less danger than was then apparent. But the master's situation was different. He had actual present responsibilities to discharge, and he had to act in the way which he regarded as the best for all the interests that were in any way entrusted to his charge.

It is not believed that any Court would have sanctioned the conduct of the master, as reasonably

prudent if, under the circumstances as he knew them, he had sailed with the contraband cargo and the ship had been stopped by Spain.

The conclusion would follow from the argument under this point that if the master's action in relanding and storing the sulphur, and sailing for New York without it, was justified under either of the two clauses (a) or (b) of the bill of lading, all the expenses incurred with respect to the sulphur would fall on the owners of the cargo, as necessarily involved in the changed nature of the cargo, under the circumstances.

III.

The steamer is exempt from liability for these claims by force of the Third Section of the Harter Act.

The third section of the act of February 13, 1893 (2 Supp. R. S., p. 81), provides that if the owner of any vessel shall have exercised due diligence to make the ship seaworthy, &c., neither the vessel nor the owner shall be liable for faults or errors in navigation, or in the management of the vessel, and continues,

"Nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea, or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried." * * *

The statutory exemption of "losses arising from * * * public enemies" appears to be the legal equivalent of the exception in the bill of lading of losses due to "restraints of princes," as to which an argument has been presented under the prece-

ding point. If that argument is well founded, it will be decisive of the case.

If, however, the Court should be of the opinion that the loss complained of was not due to a "restraint of princes," within the sense of that exception in the bill of lading, because the restraining force was not immediately and actively exerted against the vessel, exemption may nevertheless be claimed under the statute, because the loss was one "arising from the inherent * * * quality or vice of the thing carried."

The contraband quality of the sulphur was the sole cause of the losses that are here in controversy. If it had been lawful cargo, it would never have been relanded, and if it had not been useful for war purposes, it is improbable that the outbreak of the war would have enhanced the price so materially, or that the delay that occurred in bringing it forward would have resulted in any substantial loss. It was the inherent quality of the cargo that caused the price to rise with the outbreak of war, and to fall back again with the conclusion of peace.

The question under this point is, can the loss be fairly regarded as one "arising from the inherent defect * * * or vice of the thing carried"?

It is not to be assumed that this exemption is intended to be limited to material deterioration of cargo, owing to its inherent quality or vice. Losses from such causes would, of course, be within the exemption. But any other loss, which may be attributed fairly to the quality of the cargo as its cause, should be equally within the protection of the act.

The loss here in controversy arose from the nondelivery of the goods by the *Styria*. If the nondelivery by the *Styria* was owing to the inherent quality of the sulphur, it would seem that the loss that was caused by it is one "arising" from the quality or vice of the cargo.

The act of relanding the sulphur at the point of shipment was due solely to its contraband quality.

The loss that arose from such relanding was immediately and proximately caused by the nature of the goods. Unless the master's act cannot be justified as a reasonable exercise of judgment, under the circumstances, it would seem that the loss may fairly be dealt with as one "arising from the inherent quality or vice" of the cargo, and hence within the protection of the statute.

The subsidiary question whether the act of relanding the cargo was founded on good judgment, has been discussed in the preceding pages of this brief. The argument on that branch of the case need not be repeated here.

If the statute is applicable, and the loss is regarded as having arisen from the inherent quality or vice of the cargo, the expenses at Port Empedocle, as a part of the loss, would attach to the cargo by force of the statute and of the stipulation of August 12th (p. 13).

IV.

The master had the right, under the transshipment clause (*c*) of the bill of lading, to reland and transship the goods. As this was done ultimately at the ship's expense and, so far as appears, within a reasonable time, she should not be liable for damages that were incident to delay in the transshipment,

The argument under the preceding points has proceeded on the theory that the master was justified in relanding the contraband goods at the port of shipment, and that the expenses incident thereto should be borne by the goods. If the master's action can be justified on any of the grounds stated, it is unnecessary to consider the import or legal effect of the transshipment

clause. If, on the other hand, it be considered that he had no right to reland the cargo at its own expense, either because its character changed with the outbreak of war, or by reason of the exceptions (*a*) or (*b*) of the bill of lading (*ante*, p. 4), or of Section Third of the Harter Act, the shipowner may still claim the benefit of the transshipment clause in the bill of lading, but with the result that the expenses incident to the transshipment would have to be borne by the ship.

The liberty to transship appears twice in the bills of lading:

"Shipped in apparent good order and condition by [the different shippers] in and upon the steamship called the Styria, whereof Scopinich is master, for this "present voyage, and now lying in Port Empedocle, and bound for New York [certain parcels of sulphur], with liberty to call at any port or ports in any rotation in the Mediterranean, &c., * * * for the purpose of receiving and delivering coals, cargo or passengers, or for any other purpose whatsoever, * * * and with liberty to transship any part of the cargo by steamer" * * * (fols. 738–741).

Then follow certain stated exceptions to the shipowner's liability (fols. 741–743), concluding with a restatement of the liberty to transship, in these words:

"With liberty (in event of steamer putting back to this, or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer" (fols. 743–744).

After the cargo had been laden, the bills of lading had been issued for it and the ship had been cleared from the Custom House at the port of shipment, and while she lay in the roadstead off the port, a determination was reached to reland the sulphur, and store it because of its hostile character; and sub-

sequently, pursuant to an agreement between the parties (p. 13), it was transshipped by the shipowner on another steamer and delivered to the original consignees at New York under the terms of the original bills of lading (fol. 60).

It was not alleged, nor proved, that there was any unreasonable delay in transshipping the sulphur, or that there was any opportunity to transship it at an earlier time.

On these facts the claimant is entitled, if the defenses hereinbefore urged are not sustained, to have the benefit of the transshipment clause (*The Surrey*, 26 F. R., 791, 793; 40 F. R., 90; *Stewart* v. *British & African Co*., 32 L. T. Rep., 257; *Carali* v. *Xenos*, 2 F. & F., 740), and to be absolved from all further liability on being charged with the expenses that were incident to the transshipment.

The District Judge was apparently of the opinion that this clause might have been applicable to the case, though, in the view that he took of it, without advantage in the result to the defendant, because, as the case stood before him, it did not appear that the ship would be called on to pay any damages, and under the transshipment clause, the expenses incident to the transshipment would be chargeable to the vessel. The reason that he assigned for disregarding the clause, in reaching his final conclusion, was that the master, at the time, stated that he based his action on grounds which indicated that he relied on clauses (*a*) and (*b*) of the bill of lading, rather than on clause (*c*). The full statement of the District Judge's views, with reference to this clause, here follows:

"The defendant also invokes the liberty to transship under clause (*c*) of the bill of lading above quoted. This is a clause which is, no doubt, designed for the benefit of the ship alone in any emergencies that might call for the exercise of the option given. That clause might, perhaps, have been applicable in the present case, though without advantage in the result to the defendant, since the defendant would under this clause alone stand charge

able with all the expenses of discharge, storage and reloading. It was doubtful how long the vessel might be detained before it could be ascertained and determined whether a contraband cargo could be carried with a reasonable prospect of safety or not. The ship may, therefore, have had the option under this clause, in conjunction with clauses (*a*) and (*b*) above referred to, to discharge the cargo immediately and store it, as she did, rather than incur a certain loss by detention of the vessel for a more or less indefinite period while waiting until it was found safe to proceed; and while thus discharging at once, she might leave it to the chances of future events to determine against which interest, whether of ship or cargo, the expenses should be charged. If the result should show that the vessel would have been detained an unreasonable time before she could have safely sailed, then the expense would properly fall on the cargo, because the discharge would have been justified by the danger clauses (*a*) and (*b*); but if, on the other hand, it should turn out that the vessel might have safely sailed within a reasonable time, having due reference to the interests of both ship and cargo, then the discharge could not be justified under clause (*b*), but under clause (*c*) alone; and any such transshipment being at her own option and for her own convenience all the expenses of discharge, storage and reshipment would fall upon the ship, as in any other case of a transfer and reshipment under clause (*c*).

"In this case, however, the discharge was stated by the master at the time to be based upon his rights under clauses (*a*) and (*b*) only; and the various clauses of the agreement subsequently made between the parties, under which the cargo was brought forward, seem based upon the same assumption" (fols. 948-951).

The Court of Appeals expressed no opinion as to the force and effect of clause (c), though that clause was urged on its attention, both on the oral argument, and in the brief, as it had been in the District Court.

If the clause might have been applicable in any view, under the facts as they existed at the time the cargo was relanded and stored at the port of ship-

ment, the shipowner should not be deprived of the benefit of it because the master did not specifically, at the time, base his action on it, or claim whatever rights he might have had under it in justification of his conduct. (*The Willowdene*, 96 Fed., 569, 576.)

The master did not base his action specifically on any particular clause, or clauses of the bills of lading. He stated that he acted because of "facts of war," and under the faculty reserved to him by the bills of lading (fols. 427, 443). But even if he had erred in basing his action on one clause of the contract instead of another, his error should not prejudice the shipowner's actual rights. The situation at the time was one of extreme difficulty and uncertainty and, in the absence of some very specific waiver, the Court should not by inference deprive the shipowner of the benefit or protection of any of the clauses in in the contract.

The Court of Appeals has found that the master had a right to unload the cargo when he did (p. 344). It has held the ship liable because the master did not reship the goods on the *Styria*. But if the contract contained in the bills of lading was still in force, the shipowner had the right either to reship on the *Styria* or to transship by another vessel.

It was determined not to reship the goods by the *Styria;* and, whatever the shipowners' intention may have been at that time, owing to the unsettled conditions due to the existence of the war, they subsequently did transship the goods, and did so under the terms of the original bills of lading (fol. 60).

This course was within the shipowner's right under the bills of lading, as well as in pursuance of the stipulation of August 12, 1898. Unless the shipowners were in fault for failing to make the transshipment at an earlier date, the libelants would not be entitled to any damages incident to or that were caused by the transshipment when it was made, even though such damages, or some part of them, might have been avoided by an earlier transshipment. The libelants have offered no evidence that

it was reasonably practicable to ship the goods at an earlier date, or that there were facilities which reasonably ought to have been availed of to move the cargo forward at some earlier period.

In the absence of such proof, it should be assumed that the transshipment was made within a reasonable time, and was within the liberty conferred by the bills of lading; and, as the shipowner has paid all the expenses incident to the transshipment, except the charge for storage, there should be no recovery, in any view, except possibly for that item of expense which was taken in kind from the sulphur prior to its transshipment.

V.

The measure of the libelants' damages, if the master was not justified in acting as he did.

It has been contended in the previous points that the ship has fully discharged all her obligations to these libelants.

If, however, it should be held that the master's action was ill advised and wrongful, either in discharging and storing the sulphur in Italy, as the District Court held, or in failing to reload it on May 6th and bring it forward on the Styria, as the Circuit Court of Appeals determined, then it would be material to consider the measure of the damages sustained by the libelants in consequence.

In either view the result to the libelants should be the same.

1. Inasmuch as the contentions as to the actual issues varied in the courts below, from time to time, it is necessary to determine what the issues were as framed by the pleadings.

The libels were filed on June 4 (fol. 23), June 6

(fol. 100), June 4 (fol. 156), and June 7 (fol. 214), respectively, for the non-delivery on June 3d of certain quantities of sulphur that had been shipped on the Styria to be transported to New York. The positions and relative rights of the libelants and the claimant were fixed for the purposes of these suits at that time, and only those damages, if any, could be recovered by the libelants, which were asked for at the respective dates of the filing of the libels.

The libel of Morgan was "in a cause of contract" (fol. 18), and alleged the shipment on the Styria of brimstone, the property of libelants; that the master "executed and delivered a bill of lading for said brimstone, to which the libelants beg leave to refer and make a part of this their libel" (fol. 20), by which it was agreed that the brimstone should be delivered in New York, but that the vessel proceeded to New York without the said cargo. Wherefore the libelants claimed damages.

This action, therefore, was on contract and the damages which were asked for were for the breach of that contract by reason of the non delivery of the brimstone.

The libel of Parsons was in a "cause or contract" (fol. 66), and alleged the shipment of brimstone on the said steamship, and that the shippers received from the "master three bills of lading, receipts and contracts * * * whereby the master charged his body and goods, and also the said vessel * * * for the performance of the said contract, a copy of which is hereto annexed" (fol. 67).

These allegations were repeated as to a second shipment at the same time and place, and the libel further alleged the endorsement of the bills of lading to the libelant who became the lawful owner (fol. 70), that the vessel arrived at New York, but yet "the said master has not delivered the said merchandise to the said libelant" (fol. 71). The libel further alleged that the "master has neglected and refused to deliver the said goods and has converted the same to

his own use whereby the libelant has sustained damage" (fol. 71).

This action also was for breach of contract, and damages were asked for as for a conversion (fol. 72).

The libel of Malcomson was in a "cause of action" (fol. 126), and alleged the shipment on the steamer of brimstone, and that the shipper received "from the said master bills of lading, receipts and contracts whereby and wherein the said master charged his body and goods and also the said vessel * * * for the performance of said contract, a copy of which is hereto annexed" (fol. 128).

The libel further alleged that the goods were the property of the libelant by endorsement of the bill of lading, and that the steamer arrived in New York, but "the said master has not delivered the said merchandise to the libelant, but to deliver the same has refused and still does refuse whereby the libelant has been damaged" (fol. 130).

This action also was on contract and the breach alleged was the refusal of the master to deliver the cargo as agreed.

The libel of Munroe was in a "cause or contract" (fol. 182) and alleged the shipment of brimstone to be delivered at New York to the libelants, and that the shippers received "from the said master three bills of lading, receipts and contracts * * * wherein he charged his body and goods and also the said vessels * * * for the performance of said contract, a copy of which is hereto annexed" (fol. 183). The libel further alleged the arrival of the vessel at New York, "but the said master has neglected and refused to deliver the said goods and has converted the same to his own use whereby the libelants have sustained damage" (fol. 185).

This libel also was filed for a breach of contract by reason of the failure of the master to deliver the brimstone as agreed, and it asked for damages as for a conversion.

All these actions sound in contract. Each one of the four libels refers to the bill of lading as the con-

tract under which the sulphur was carried and either annexes the bill of lading to the libel or otherwise by reference makes it part of the pleading.

Of the four libels, one alleges non-delivery through failure of the ship to carry the cargo (fol. 21), another alleges refusal of the master to deliver (fol. 130), and two allege conversion (fols. 72, 185).

The answers of the claimant are uniform in all the cases. They allege the master's justification for his action (fols. 31, 39); the defense of restraints of princes (fol. 40); the defense under the clause in the bill of lading that provides that "the shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance" (fol. 40); the defense under the clause in the bill of lading that the shipowner is not to be liable in any case for more than the invoice or declared value of the goods, whichever shall be least; the defense under the Italian law which prevailed at the port of shipment, according to which the shipowner could withdraw from his contract of carriage without becoming liable in damages, if war has been declared, so that in consequence the goods to be carried could no longer be considered free.

In connection with the defense limiting the shipowner's liability in any case to the invoice or declared value of the goods whichever shall be least, the claimant sets out (fol. 42) the stipulation of August 12 (fols. 57–64, Brief, p. 13), alleging that the cargo has been brought forward under it and sold by the libelants, and "that libelants have realized, by the sale of the said sulphur, more than its invoice price, and that, accordingly, under the above quoted provision of the bill of lading, the libelants have not suffered any damages in the premises which are recoverable in this action" (fols. 42, 43).

The effect of this stipulation will be considered more particularly hereafter. It is important in this connection, however, as showing that the claimant

did not consider that the case as stated in the libels was varied in any way by the stipulation, except that the ship thereby became entitled to credit the proceeds of the sale of the sulphur against the libelant's claim for non-delivery, and it was contended that this claim must be limited to the invoice value.

The issue as met by the answer in these cases was one of non-delivery of the goods to the libelants, and not one of delay in delivery. When the libels were filed the libelants had not received their goods, and they asked for damages accordingly—*propter rem ipsam non habitam*, as the civilians say. It must have been quite immaterial to them where the goods were and how they had been disposed of or what had become of them inasmuch as they themselves did not have them.

It would have been impossible for the libelants to have brought suit at the time when the libels actually were filed if they had been suing for their damages by reason of delayed delivery. There was nothing to indicate at that time that the sulphur ever would be brought forward nor what its value would be when that had been done. If there was any thought that the sulphur would eventually be carried by the owners of the *Styria*, on that vessel or on some other ship of their line, conceivably it would be worth on its arrival far more than it would have been if it had arrived on the *Styria*, in June, 1898. What, if any, damage the libelant would have suffered by reason of delay merely, it is impossible to state. Certainly under the supposititious conditions there would have been no loss of market.

If the libelants had sued for damages sustained by them by reason of their inability to carry out contracts that they might have made with regard to the sulphur, they, doubtless, would have pleaded such facts or shown them on reference to ascertain the damages. Nothing of the sort was done.

It must be taken conclusively that the libelants also did not consider that the nature of the case had

in any way been altered by the stipulation of August 12. The sulphur had been brought forward on the *Abbazia* and had arrived at New York on September 30 (fol. 648). The answers had all been filed on December 1, 1898 (fols. 64, 125, 179, 238).

The libelants did not make any move to amend their pleadings after the sulphur had been brought forward under the stipulation, nor did they take any exception to the answers in which the stipulation had been pleaded nor was there any suggestion by them at any time that by reason of the stipulation the nature of the actions had been changed from the original claim of damages for *non-delivery* to the theory of damages for *delay in delivery*.

Disregarding, therefore, for the moment the effect of the stipulation the case will be discussed on the issues raised by the pleadings and as if there had been no stipulation. It will then be considered whether or not the stipulation can affect the principles which otherwise would control the case and if so, to what extent.

2. It has been shown that the gravamen of each libel is the non-delivery of the brimstone or sulplur as agreed by the master. There was, therefore, a total breach of contract in each case and the libelants were entitled to those damages and only those damages which the shipowner would be bound to pay for a total breach, as of the date of the arrival of the *Styria* at New York.

It is not material to consider whether or not the libelants might have brought actions of tort, nor whether they would have any greater rights in that event. It is sufficient that they did not do so.

The contracts in all the cases were practically the same. They are evidenced by the bills of lading which were executed by the master for each shipment and were referred to in each one of the libels (*ante*, pp. 74–76). These bills of lading all contained the same terms, exceptions and conditions (fols. 405, 738). The originals were produced by the libelants,

at the request of the claimant, on the examination of the master (fols. 399–404).

The identical form is given at folios 739–762.

One of its conditions, and, therefore, a part of the contract in each case, is the following (fol. 753):

"The shipowner is not to be liable for any damage to any goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for claim for damage or detention to goods under through bills of lading where the damage is done or detention occurs whilst the goods are not in the possession of the Shipowner, *nor in any case for more than the invoice or declared value of the goods whichever shall be the least.*"

The bill of lading also contained the clause:

"NOTICE.—In accepting this bill of leading, the shipper or other agent of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed" (fol. 759).

Under these provisions of the bills of lading, if a liability is adjudged under the issues stated in the pleadings, the libelants would be entitled to recover damages as for a total loss.

3. The clause restricting the liability of the shipowner to the invoice or declared value of the goods is valid and is applicable to a case where the loss or damage has arisen from the carrier's negligence. Such a clause has been so adjudged by this Court in *Hart* v. *Pennsylvania R. R. Co.* (1884), 112 U. S., 331, and in *Calderon* v. *Atlas Steamship Company, Limited* (1898), 170 U. S., 272, 278.

In *Hart* v. *Pennsylvania R. R. Co.*, the plaintiff sued the defendant as common carrier for breach of a contract to transport five horses and other property from Jersey City to St. Louis. By the negligence of the defendant one horse was killed and the others injured, and the other property was de-

stroyed. The plaintiff offered to show that the actual value of the horse killed was $15,000; that the other horses had been worth from $3,000 to $3,500 each, but had been rendered worthless in consequence of their injuries. The defendant objected to this testimony on the ground that it was not competent for the plaintiff to prove any damage or loss in excess of that set out in the bill of lading. The Court sustained the objection and the plaintiff excepted.

It appeared on the trial that the horses were race horses, and that they and the other property were in one car.

The bill of lading under which the property was transported, contained this clause:

"To pay freight thereon to said Company at the rate of ninety-four (94) cents per one hundred pounds (Company's weight) and all back freight and charges paid by them, on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules not exceeding $200 each. * * * If a chartered car on the stock and contents in same, $1,200 for the car load."

The above clause was not previously agreed to between the parties, but was inserted in the bill of lading by the carrier as a statement of the extent to which he assumed liability.

It was held by this Court that the evidence as to value was rightly excluded.

Mr. Justice Blatchford, in delivering the opinion of the Court (p. 337), said:

"It is further contended by the plaintiff that the defendant was forbidden, by public policy, to fix a limit for its liability for a loss by negligence at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property and a rate of freight is fixed accordingly, and the present case. It is said that, while in the former case the shipper may be confined to the value he so fixed, in the

event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation and that the liability should go to that extent and no further.

* * *

(p. 240.) "It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract.

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. *The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation between the parties to the contract. The parties must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld.* There is no violation of public policy. On the contrary, it would be unjust and unreasonable and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

To the same effect—

The *Hadji*, 18 Fed. R., 459, and cases cited.

The *Alene*, 23 Blatchf., 335, 346, was another case where the invoice value clause in the bill of lading was upheld against the consignee.

The libel in that case was filed for negligent injury to cargo. A quantity of oranges had been discharged from the steamship at an improper time when it was so cold that the fruit became frozen. The oranges were sold at auction by the Government at a sum not sufficient to pay the freight and duty. The oranges had been shipped by three shippers, of whom the libelant was not one. The libelant was the consignee in the bills of lading, which provided: "The company will not become liable for any value exceeding one hundred dollars ($100.00) upon each of the above named packages, unless the value is declared at the time of shipment, and so expressed in this bill of lading, and extra freight thereon paid, nor in any case for an amount exceeding the invoice cost thereof."

In the District Court the libelant was held entitled to recover the market value of sound oranges at the time of delivery. This amounted to $5,784.01. On appeal to the Circuit Court it was held that the libelant could recover only the invoice value, which was $1,832.76, less the freight.

Blatchford, *J.*, said (p. 346): "In accepting each bill of lading, the shipper accepted the terms of the contract it contained, and the libelant cannot now be heard to say that the shipper did not know its contents, or received it after the shipment, or that he did not know its contents or that the clause as to invoice value has been waived in other cases. The provision that the claimant shall not be liable in any case for an amount exceeding the invoice cost of the oranges is distinct."

A limitation clause has also been upheld where there has been no expressed valuation.

In *Belger* v. *Dinsmore*, 51 New York, 166, a trunk containing articles of the value of $467 was delivered to a carrier. The receipt, accepted for it, by the

shipper, contained a condition that "nor in any event, shall the holder herein demand beyond the sum of Fifty Dollars, at which the article forwarded is hereby valued; unless otherwise herein expressed, or unless specially insured by them and so specified in this receipt; which insurance shall constitute the limit of liability of the Adams Express Company."

There was no valuation of the property so delivered, nor of any part thereof expressed in the said receipt, nor was it specified therein that the same, or any portion thereof, had been specially insured. The trunk was lost. The Court said (p. 173):

"The plaintiff in this case must be assumed to have paid freight on the trunk in question, and its contents, worth $467 at the rate prescribed for an article not exceeding $50 in value. He was then willing and agreed to assume all risks for the excess in value and to relieve the company from liability on account thereof, beyond that sum. He can with no more propriety or justice claim remuneration therefor, than the company could demand additional freight therefor."

In *New York Central & Hudson River Railroad Co.* v. *Fraloff* (1879), 100 N. Y., 24, 27, Mr. Justice Harland said:

"It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon adititional compensation proportioned to the risk."

In *Westcott* v. *Fargo* (1875), 61 N. Y., 542, Dwight, *C.*, said (p. 551):

"The true question in the cause concerns the effect upon the grantees of the stipulation that the defendant should 'not be liable for any loss or damage of any box, package or thing for over fifty dol-

lars, unless the just and true value is herein stated.'

It must be conceded that this stipulation, under the circumstances of this case, is a part of the contract and is binding on the plaintiff. This is decided in *Belger* v. *Dinsmore*, 51 N. Y., 166, and in *Steers* v. *Liverpool Steamship Co.*, 57 N. Y., 1."

In *Alair* v. *Northern Pac. Co.*, 53 Min., 160, the Court said that if a stipulation as to the value of the property is "fairly and honestly made as the basis of the carrier's charges and responsibility, then we think it ought to be upheld as a just and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant claims." The Court further said that it made no difference whether the value was fixed at a specified sum, or at not more than a stated amount; and that it was not material whether the valuation was one previously named by the shipper, or that inserted in the contract by the carrier. In any event, if the contract was fairly made, it limited the liability of the carrier, regardless of whether the loss occurred through its negligence or not.

In *Durgin* v. *American Express Co.*, 66 N. H., 277, the Court, in a case of loss by negligence, said:

"The defendants agreed to respond in a sum not exceeding $50, in case of loss, and, for the purposes of the contract of transportation, between the parties to the contract, the goods have no further value."

Many cases have held that a stipulation that the measure of damages shall be the *market value of the goods, at the time and place of shipment*, instead of at destination, is valid, if freely and fairly entered into, and is applicable to cases of losses arising from negligence (*South & North Ala. R. Co.* v. *Henlein*, 52 Ala., 606; *South & North Alabama R. R. Co.* v. *Henlein & Barr*, 23 Am. Rep., 578; 56

Ala., 368; *Louisville Ry.* v. *Oden*, 80 Ala., 38; *Chicago Ry.* v. *Hannon*, 17 Ill. App., 640; *Caples* v. *Louisville Ry.*, 17 Mo. App., 14; *Rogan* v. *Wabash Ry.*, 51 Mo. App., 665; *Hutchinson on Carriers*, § 249).

The carrier's liability may also be limited, by the bill of lading, to a named sum (*Muser* v. *Holland*, 17 Blatchf., 412; *Coupland* v. *Housatonic Ry.*, 61 Conn., 531; *Belger* v. *Dinsmore*, 51 N. Y., 166; *Zimmer* v. *N. Y. Cent.*, 137 N. Y., 460; *Alair* v. *Northern Pacific*, 53 Minn., 160; *Johnston* v. *Richmond Ry.*, 39 S. C., 55; *Squire* v. *N. Y. Cent. Ry.*, 98 Mass., 245; *Graves* v. *Lake Shore Ry.*, 137 Mass., 233; *Hill* v. *Boston, &c., Ry.*, 144 Mass., 284; *Richmond, &c., Ry.*, v. *Payne*, 86 Va., 481).

As was said by Brown, *J.*, in *The Denmark*, 27 Fed. R., 141:

"The right of a carrier to protect himself against claims for extraordinary damage by stipulaling for notice of articles specially valuable in order that special care may be given to them and to require the payment of a proportionate compensation, is now too well settled to be questioned. Muser *v.* American Exp. Co., 1 Fed. Rep., 382; The Hadji, 18 Fed. Rep., 459; Hart *v.* Pennsylvania R. Co., 112 U. S., 331; s. c., 5 Sup. Ct. Rep., 151; Magnin *v.* Dinsmore, 70 N. Y., 410."

The reason for the rule is well stated in Mr. Reed's original brief for Parsons (p. 20) filed in the Court below, where he says:

"The limitation is held justified, in the reported cases which lead the way, on the ground that thereby speculation as to the shipper's possible profits in the port of destination is eliminated, and if he is made whole, justice is done, if the parties so agree."

The contention was made in the Court below by the libelant Parsons that the rate of freight was the same for all the brimstone, although it was of different grades which had different values, and consequently the rate of freight could not be regarded

as depending on the value. In fact, the freight rates shown in the bills of lading are not identical. For instance, in the consignment to Parsons there were brimstone seconds on part of which the freight was seven shillings and sixpence a ton (fol. 68). In the consignment to Malcolmson there were some brimstone thirds on which the freight was six shillings and sixpence a ton (fol. 139). It is true that in some instances the freight was the same on both seconds and thirds, but as the difference in valuation between seconds and thirds was very slight it may well have been disregarded.

Any slight variation in the freight rate may also be accounted for by the fact that the shipments were made by different firms (fols. 19, 77, 134, 191), and the contracts for the shipments doubtless were made at different times during which the freight rate was not constant.

This consideration, however, was passed on directly by this Court in *Hart* v. *Pennsylvania R. Co.* (*ante*). In that case it appears that the agreed valuation was not the invoice value, but "if horses or mules, not exceeding two hundred dollars." The Court will take judicial notice, perhaps, that there is more opportunity for variation in the value of horses than in brimstone in which there are but a few grades. Nor are horses and mules interchangeable terms nor are the animals of interchangeable values. In that case the plaintiff attemped to show that the horses were worth much more than the sum of two hundred dollars. He was not permitted to do this

Blatchford, *J.*, said as to this:

"It must be presumed, from the terms of the bill of lading and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so as the bill of lading is what its heading states it to be, a limited liability

live stock contract, and is confined to live stock. Although the horses, being race horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value greater or less, otherwise than as he assented to the value named in the bill of lading by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight."

It would seem therefore that these cases are on all fours with *Hart* v. *Pennsylvania R. Co.* as to the applicability of the limitation of liability clause to the facts in the cases.

In the cases here under consideration, which also are for damages for a total loss, the libelant was permitted to show the high value of the sulphur. It would seem that this was manifest error.

The valuation here was the invoice value. That was a definite sum, and was in fact fixed by the shippers. After it had been so fixed it was incorporated in the bills of lading and constituted the "agreed valuation," under the language of Mr. Justice Blatchford, quoted above, as distinctly as if the figures of the invoice value had been inserted.

It was contended in the court below that the invoice value clause had no application to the facts in this case inasmuch as certain claims specified in the clause did not meet the situation here. It is submitted, however, that this contention rests on a misreading of the language of the clause. Certain kinds of damage, indeed, are specified which probably

would cover the ordinary claims that would be made on the carrier. The framers of the clause apparently had in mind, however, that every possible kind of claim could not be specified in advance, and for that reason they added the words "*nor in any case* for more than the invoice or declared value of the goods, whichever shall be the least."

The paragraph taken as a whole is not composed of alternative clauses relating to a single sort of loss and dependent for their applicability on the particular circumstences specified. The words "in any case" were evidently intended to cover any possible case that could arise; if they were not, it is difficult to attach any meaning to them whatever.

If the clause is applicable to a case of negligence as decided by *Hart* v. *Pennsylvania R. Co.*, it can make no difference whether the negligence resulting in the loss was due to inaction by the carrier or to ill-advised or intentional action, if only the bounds of good faith have not been exceeded by the carrier. If the carrier has not been guilty of fraud the owner of the goods can have no greater nor different rights against the carrier, though his misconduct was willful than if it had been unintentional. It may well be that if the carrier's breach of contract was fraudulent, he would lose any benefit of the contract that he had made with the skipper. But that situation is not presented here. There is no suggestion that the master of the *Styria* or the owners of the vessel had any intent to defraud the owners of the sulphur when he relanded it at Port Empedocle. The master testifies that he thought it was unsafe to carry the sulphur, or as he stated in his notice sent to the shippers of the sulphur, "on finding risky my passage to New York with the actual sulphur cargo, for facts of war" (fol. 427); he accordingly sent the sulphur ashore. The Court of Appeals held that the master was justified in relanding the sulphur when he did (p. 346)

The District Judge thought that the action of the

master was too hasty (fol. 945). The Court does not find, however, nor is there the slightest suggestion in the case that there was any bad faith exercised on the part of the ship. So far as the owners of the *Styria* are concerned, if it should be considered that they in any way influenced the action of the master, there is no doubt that they were actuated solely by a regard for the safety of the non contraband cargo and of the ship.

The question of fraud, therefore, being eliminated, the libelants are to be regarded as in no better position than they would have been if the Styria had made the voyage with the cargo on board and had gone to the bottom, because of negligent navigation. That is to say, such a view would be the most unfavorable one to the claimant and would be the most favorable one to the libelants, for it would put them in a position to recover as for a total loss. *Ex vi termini*, this must be greater than any partial loss that they could sustain.

This is also the position which the libelants assumed. The libels were all drawn, as has been shown hitherto (Brief, pp. 76–78), for conversion or non-delivery of the sulphur. There is no magic in the word conversion. The libelants did not have their goods, and they sued for what they claimed was their full value.

If the goods had arrived and had been delivered by mistake to the wrong consignee there can be no question but that the clause limiting the ship's liability to the invoice value would have applied. It should apply equally in a case where, from a mistaken belief as to his rights, the carrier, under such extraordinary circumstances as here existed, assumed to terminate the contract under the special clause (*b*) above referred to (*ante*, pp. 4, 51), and failed to make any delivery whatever. There was nothing willful or tortious in the carrier's action, much less was there any suggestion of fraud.

The four learned Judges who have heard the case, long after the date of the occurrences, have not

agreed among themselves as to what the master's rights and duties really were. It cannot be said, therefore, that any mere mistake the carrier may have made by reason of erroneous judgment formed by the master under the stress of circumstances with which he was confronted, was such as to vitiate the stipulation in the bill of lading limiting the ship's liability to the invoice value of the goods.

4. If the propositions can be regarded as established that the limitation of liability to the invoice value is a valid clause and that it is applicable here, the question, then, is of the interpretation of the clause in the ascertainment of damages.

In view of the stipulation of August 12 it is not necessary, perhaps, for the claimant to argue that by the contract of the bill of lading the invoice value represents the limit of damage that the owner of the goods can suffer and that it is "the basis of settlement of any loss or damage," as found by the District Judge (fol. 1177), rather than a statement which "fixes a final limit of liability beyond which he (the shipowner) shall not be required to respond," as construed by the Court of Appeals (p 349).

Inasmuch, however, as the meaning of the invoice value clause should properly be determined before the stipulation is considered and without reference to it, it is, perhaps, proper that the claimant should urge on this Court the correctness of the view of the District Judge.

a. Judge Brown's interpretation is in accord with his previous decisions in the cases of the *Hadji*, 18 Fed. R., 459; affirmed 20 Fed. R., 875, and *Pearce* v. *Quebec S. S. Co.*, 24 Fed. R., 285, and was followed in the District of New Jersey in the *Lydian Monarch*, 23 Fed. R., 298, 300.

b. The position of the Court of Appeals is apparently based on a decision of the State Court of Massachusetts, in *Brown* v. *Cunard S. S. Co.*, 147 Mass., 60, in which it was stated that, on a partial loss, the plaintiff could recover his full damages

up to the limit of the invoice value. In the Massachusetts case the attention of the Court seems to have been called to the decisions in the Federal courts, but it declined to follow them, if they could not be distinguished from that case, and decided that the plaintiff was entitled to recover damages up to but not exceeding the invoice value.

The consequence of the Massachusetts rule is that the shipper is allowed to speculate, up to the amount of the invoice value, on what the market value of the goods will be at their destination, and he may do this, not at his own risk but at the risk of the carrier. So, if by some sudden fluctuation or adventitious cause, as in this case, the market value of the goods at the place of destination should amount to almost twice the invoice value, then in case of partial loss the owner of the goods would recover his damages up to the invoice value and would also have his damaged goods.

In case of total loss he could, of course, recover no more than the invoice value which the parties have agreed will be entire compensation for the loss. This must be so for the shipper or owner of the goods cannot be regarded as having contracted for a less liability on the part of the carrier than will be sufficient to make the owner whole unless, indeed, the owner conceals the value of the goods from the carrier and no questions are asked and nothing said or agreed on as to the limit of the carrier's liability. That is not this case.

If the shipper is not satisfied with the limitation suggested by the carrier he always has the option to secure a greater recovery by paying for such security proportionally. In the present cases, if the shippers did not consider the invoice value as given a proper measure of the value of the sulphur, they might have invoiced it at a much higher figure. The liability of the carrier would have been increased to that extent.

The libelants cannot be heard now to complain that the parties, to whose rights they succeeded

and by whose contracts with the carrier they are bound, did not correctly state the value of the goods. The carrier cannot be subjected to any greater liability than he has contracted for as to the goods, because the shipper may have disposed of the goods and the contract to third parties. The bill of lading although a negotiable instrument is not of such a character as to give the vendee rights which the vendor did not have (*Pollard* v. *Vinton*, 105 U. S., 7; *The Asphodel*, 53 Fed. R., 835).

Thus the Massachusetts rule in the case of partial loss would give more than compensatory damages. There can be no better comment on this than that made by the District Judge (fol. 1177):

" A construction seems to me impossible, and, in fact, absurd that would call for the same payment on a partial loss as upon a complete destruction of the goods."

Such a construction seems still more absurd when it is considered that the payment on a partial loss might result more favorably to the owner than if there had been a total destruction of the goods, for the owner would have the invoice value if he could prove the loss, and also have the damaged goods. If the invoice value should be taken as " the basis of the settlement of any loss or damage," no such inequitable result could be reached.

If the owner shall receive the invoice value of his goods he will be compensated. Compensatory damages are the only damages he is entitled to receive. As was said by Clerke, *J.*, in *Medburg v. N. Y. & Erie R. R. Co.*, 26 Barb., 564, 567 (1858): " Compensation for actual loss sustained, is the fundamental principle upon which our law bases the allowance of damages. It will not, indeed make this allowance upon a calculation of speculative profits; for this would be proceeding upon contingencies, and would involve the subject too much in uncertainty."

This rule is general.

This exclusion of the element of profits from one scope of the contract places the rule in case of breach of contract in accord with that which is followed in cases of loss of goods where there is no contract. In such cases, the measure of the shipowner's liability *in tort* is the value of the goods at the time of shipment, or in other words, the invoice value (*Smith v. Condry*, 1 How., 29; *The Vaughan*, 14 Wall, 258; *The Scotland*, 105 U. S., 24, 25; *The City of New York*, 23 Fed. R., 616, 619).

Applying these principles to the present cases, it would mean that the recovery to which the libelants would be entitled respectively under the libels, is the invoice value of the several lots of sulphur. The shipments of sulphur were invoiced as follows: Morgan, $4,279; Parsons, $6,925; Malcolmson, $27,246; Munroe, $2,329 (fols. 383-385) If there were nothing more in the cases, the libelants on the foregoing assumptions should recover from the *Styria* these sums. There is to be considered, however, the stipulation of August 12.

5. The Stipulation of August 12.—At the time this stipulation was entered into, the sulphur was in store in Sicily. When the master discharged the sulphur, acting under the exceptions in the bill of lading (fols. 742, 756, 757) he placed it in the charge of a mercantile agent, and gave notice designating the warehouse to the shippers and to the consignees, and also to the Austrian Consul, as provided in the bills of lading.

The form of the notices which were the same in each of the cases (fol. 425) is given at folios 426-432.

The libelants and their agents in Sicily had refused to touch the sulphur. The position assumed by them was that they had delivered the sulphur to the ship, and that they required delivery by the ship to them at New York. They refused to sanction the action of the master in relanding it at Port Empedocle, and they would not exercise any control or dominion over it or retake possession of it. In effect, they

abandoned the sulphur to the ship and looked to the ship and its owners for their damages.

Expenses were accumulating, meantime, against the sulphur in Sicily, and it was for the interests of all parties that further expenses should not be incurred.

At any time prior to a decree against the ship for the invoice value of the sulphur, or certainly prior to the satisfaction of any such decree, the libelants doubtless might have had the sulphur sent forward to New York. Its market value then or the proceeds of the sale of it would necessarily reduce *pro tanto* the damages that the libelants might have sustained by the *Styria's* failure to deliver.

It would, however, be necessary to pay freight on the sulphur by whatever line it should be brought forward. The claimant, the Austro-Americana Steamship Company, was operating a line of steamships from Sicily to New York. After sulphur became free the steamship company was quite ready to carry it to New York if freight could be earned thereon.

It was therefore agreed by all parties that the cargo should be forwarded by the claimant's line on the first available steamer from that port. This proved to be the *Abbazzia*.

As the cargo had to be brought under a bill of lading, and the terms of the bills of lading originally issued by the *Styria* apparently were satisfactory to all parties it was agreed that those terms should be adopted and should form the contract under which the goods should be carried by the *Abbazzia*.

The libelants were unwilling to have such forwarding of the sulphur by the claimant act in any sense as a performance of the original contract of carriage. Accordingly, it was agreed that the cargo should be sold on its arrival and the proceeds, less charges incurred, should be credited on account of the damages, if any, that might be recovered in these cases by the libelants.

If it should be determined that the ship was justified in discharging the sulphur at Port Empedocle

under the then conditions, the libelants would not have suffered any damage that they could recover against the claimant. Whether or not the master was justified could not be told at that time. Both parties thought they were right in their contentions. If the claimant was right, the libelant would have in hand the proceeds of the sale of the sulphur, which would be lessened by expenses in Sicily if the sulphur should remain there till the decisions in these actions. Similarly, if the libelants were right, it was well, from the claimant's point of view, that the proceeds of sale should not be eaten up to large extent by storage charges.

These matters were covered by the first paragraph of the stipulation.

The second paragraph of the stipulation provided that the claimant should have a lien on the sulphur for the charges against it in Sicily which the claimant would have to pay to release it from store, if it should be determined that the master was justified in relanding the sulphur in April. If his action should not be upheld, then the sulphur would be free from any lien for such charges.

The third clause in the stipulation provided that anything done under it by either party should be without prejudice in the pending suits, except as herein provided.

This stipulation was the subject of very careful consideration by five counsel, and there can be no question that it embodies exactly the agreement the parties intended to make. It is a perfectly valid contract of carriage based on a good and valuable consideration.

There is nothing in the stipulation to indicate that it was intended to change the nature of the actions, if indeed that would have been possible, or in any way to determine or prejudice the rights of the parties. Indeed, the terms of the third clause expressly declare to the contrary.

It did not purport to, and it did not, in fact, change the situation of the parties. Its terms are

not ambiguous. They require (1) that the ship's liability, if any, and the extent of the damages sustained by the libelants in consequence should first be ascertained, and (2) that against the liability so ascertained, the consignees should credit the net amount realized on the sale of the sulphur.

Under these conditions, the sulphur was brought to New York by the *Abbazia*, which arrived on September 30, 1898 (fol. 648), and was then sold. The following tables show the invoice values of the several lots of sulphur, the proceeds of sale, the expenses thereof and the freight:

Morgan.

Invoice Value		$4,279 00
Proceeds of Sale	$4,513 46	
Weighing Charges	24 40	
		4,489 06
Freight		354 98

(fols. 1111–1112.)

Parsons.

Invoice Value		$6,925 00
Proceeds of Sale	$7,402 00	
Weighing Charges	112 88	
		7,289 12
Freight		528 00

(fol. 1116.)

Malcolmson.

Invoice Value		$27,246 00
Proceeds of Sale	$28,500 31	
Weighing Charges	116 12	
		28,284 19
Freight		2,182 50

(fol. 1123.)

Munroe.

Invoice Value		$2,329 00
Proceeds of Sale	$1,987 08	
Weighing Charges	10 00	
		1,987 08
Freight		145 00

(fols. 1128–1129).

The procedure which should have been adopted, accordingly, in assessing the damages, in view of the foregoing propositions and the terms of the stipulation, if liability had been found, would have been to decree full damages for the total failure of the ship to deliver, or, in other words, the invoice value of the shipments. Against these damages should have been credited the proceeds of the sales of the sulphur, less the charges incurred. In fact, this is what the District Court did, except that it allowed the amount of the freight to be deducted from the proceeds in determining the net amount that should be credited against the damages. In this respect it is claimed that the District Court was in error.

The stipulation specifically provided that the goods should be brought forward and delivered "upon the terms and *for the freight* specified in the original bills of lading," and that the consignees were "to pay the agreed freight on right and true delivery" (fol. 60). Then followed a semicolon, and after that a further clause that "the goods upon arrival to be sold at current market rates and the proceeds, *less charges incurred*, to be credited on account of the damages, if any, recovered in these cases by the libelants" (fol. 61).

The words "charges incurred," in that phrase plainly meant such as were incurred in connection with the sale. In other words, the net, and not the gross proceeds of sale were to be credited against the claims. The freight was to be paid before the consignees got possession of the goods, and hence before they would be in a position to make a sale. The matter of freight was to be done with before the question of a sale should arise.

The District Court said (fol. 952): "The stipulation in the bill of lading that the shipowner 'is not to be liable in any case for more than the invoiced or declared value' of the goods, does not mean that the consignees shall pay freight in addition to the loss of the invoice price;" * * *

The wording of the stipulation does not import

any such suggestion. Freight on the cargo under the original contract was never earned by the *Styria* and the consignees were never required to pay it. The stipulation did require freight to be paid by the consignees on the cargo on the *Abazzia*. If the cargo had been brought by the *Styria* originally, freight would have been due; so, if some third party had brought the sulphur forward eventually, in place of the *Abazzia*, it would have been necessary for the consignees to pay freight, but it would not have been a charge in any way connected with the sale. In effect to deduct the freight from the proceeds of sale was to allow the consignees the value of the sulphur in New York without any cost to them of bringing it there.

The suggestion that the steamship company, doing business as a common carrier, would voluntarily stipulate to carry the cargo gratuitously under any circumstances, is almost fanciful.

If the freight had not been deducted, it will be seen by reference to the tables previously given (*ante*, p. 96) that in all the cases but that of Munroe the net proceeds of sale, less the charges incurred, exceeded the invoice value, and consequently the claimant should not have been held liable for any damages, except to Munroe, in the sum of $341.92.

It is not contended that the libelants might not have secured a possible profit if the sulphur had arrived on the *Styria*, but it is strenuously maintained on the foregoing principles that the carrier should not be held liable for such a speculative loss.

The Circuit Court of Appeals adopted a view altogether at variance with the decision of the District Court and, except as to their determination in the matter of the freight, it is submitted that their errors were manifold.

6. The Court of Appeals considered the case as if the libels had been filed for a delay in delivery by the carrier, and they held that the measure of damages in consequence was the difference between the price

the goods actually brought and the price they would have brought had they been sold on the day when they should have arrived.

They declined to adopt the interpretation of the District Court of the invoice value clause. They construed it as fixing the limit of the amount the carrier could be called on to disburse.

In assessing the damages they credited the proceeds of sale less the charges incurred, which were the expenses of weighing, against the June market value of the sulphur, and they directed that a decree should be entered in the libelant's favor for the balance, less the freight which, they agreed, the libelants had to pay.

The result was to deprive the claimant of all benefit of the invoice value clause, and to put it in a worse position than if the stipulation had never been made.

Under the present decision the libelants may keep the proceeds of sale, which approximately equal the invoice value of the goods, and may also recover a loss of profit, which the Court says will exceed $20,000 (p. 364); while, if the shipowners had not brought the cargo along in the *Abbazia*, it seems clear that the libelants would have recovered no profits, but only the invoice value of their goods. The result reached by the Court of Appeals flows from an act done by a party under the stipulation, and hence violates the provision that "this stipulation and anything done by any party under it shall be deemed to be wholly without prejudice in the pending suits, except as herein provided" (fol. 791).

If the cases had continued in the condition existing on the day the stipulation was made (August 12th), decrees would have passed against the ship for non delivery merely, or for a conversion. In either case they would have been for full damages, for the amount of the invoice value of the sulphur.

If the shipowner had paid such decrees the property in the goods would have been transferred to it. The shipowner could have sold the sulphur then as

its own property, so as to provide a fund for the recoupment of its loss.

There is no doubt about this proposition as applied to payments of total losses by insurers; and the same rule has been applied to the payment of the full value of goods, or that which is agreed to be the full value, by carriers.

Subrogation is accorded to an insurance company paying a loss in full, and claiming the remnants or proceeds of the insured property (*Sun Mut. Ins. Co.* v. *Hall*, 104 Mass., 507; *Randall* v. *Cockran*, 1 Ves. Sr., 98; *Stewart* v. *Greenock Ins. Co.*, 2 H. L. C., 159; *Tunno* v. *Edwards*, 12 East., 488) or a payment, obtained by the assured, on account of the loss of the property insured (*North of Eng. Ins. Assn.* v. *Armstrong*, L. R., 5 Q. B., 244, 248, 249, 250; *Darrell* v. *Tibbetts*, 5 Q. B. D., 560), or a right of action against one by whose fault the loss occurred (*Mobile Ry. Co.* v. *Jurey*, 111 U. S., 584, 594 *St. Louis & Iron Mountain Ry.* v. *Continental Ins. Co.*, 139 U. S., 235), or a contribution in general average in respect of the insured goods (*Dickenson* v. *Jardine*, L. R., 3 C. P., 639; *The Knight of St. Michael* [1898], Prob., 30, 36; *International Nav. Co.* v. *Atlantic Mutual Ins. Co.*, 100 Fed., 304).

In such cases the underwriter, if there be no express agreement to the contrary, is entitled to all salvage (*Brooks* v. *Macdonnell*, 1 Y. & C., 500; 2 *Arnould on Insurance*, 3d Ed., p. 866; 2 *Phillips on Insurance*, §§ 1707, 1711, 1712, 1723; 4 *Joyce on Insurance*, §§ 3538, 3549, 3574, 3575).

A similar subrogation is allowed to a carrier who has paid a consignee for the loss of goods (*Hutchinson on Carriers*, 2 Ed., § 427; *The Enchantress*, 26 U. S. App., 144), or who has paid charges on the goods for which others are liable (*Streeter* v. *Chicago Ry.*, 40 Wis., 294).

In *Sun Mutual Ins. Co.* v. *Hall*, 104 Mass., 507, it was held that an insurance company which had paid a total loss on cargo, was entitled to the pro-

ceeds of sale of damaged cargo, in a port of distress, and could recover them from a creditor of the ship in whose hands they had been placed by the master.

Chapman, *C. J.* (at p. 509), said:

"The abandonment, from the time it was accepted, related back to the time of the loss, and put the insurers in place of the owners (2 *Phil. Ins.*, § 1708; *Clark* v. *Wilson*, 103 Mass., 219). The master of the vessel in the discharge of his duties to all parties interested, had purchased the draft in question with the proceeds of the cargo and sent it to the defendants, who had notice that it was the property of the plaintiffs. They ought to have sent the draft or its proceeds to the plaintiffs, whose property it was, or to * * * (the cargo owners) who would have received it for the plaintiffs. But this action should not have been brought by * * * (the cargo owners), for they had no right to the proceeds as against the plaintiffs. It is properly brought in the name of the plaintiffs, who were the owners of the draft and its proceeds."

In *North of England Ins. Association* v. *Armstrong*, L. R , 5 Q. B., 244, a policy of insurance was effected for £6,000 on the ship *Hetton*, valued at £6,000. The *Hetton* was run down and sunk by another ship. The underwriters of the *Hetton* paid her owners £6,000 as for a total loss. Afterwards £5,000 was recovered in the Court of Admiralty by the owners of the *Hetton* against the owners of the other ship.

The real value of the *Hetton* was £9,000. There was no other insurance on her; but the owner claimed to be his own insurer for the difference between the £6,000 insured under the valued policy, at that value, and £9,000, the real value; and accordingly alleged that he was entitled to one-third of the £5,000 recovered from the other vessel.

In an action by the Insurance Company against the owner of the *Hetton* to recover the whole of the £5,000 paid by the owner of the other vessel under the decree of the Court of Admiralty, it was held that as between the underwriters and the owners of

the *Hetton*, her value must be taken to be £6,000 *for all purposes*, and that, therefore, the damages recovered which were in the nature of salvage, belonged entirely to the underwriters.

Cockburn, *C. J.*, in the course of his judgment (pp. 248, 249), said:

"We are satisfied that our judgment must be in favor of the plaintiffs; and I ground my judgment upon the general proposition, that where the value of a thing insured is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the value, then, in respect of all rights and obligations which arise upon the policy of insurance, the parties are estopped between one another from disputing the value of the thing as stated in the policy.

"Now, I take it to be clearly established, in the case of a total loss, that whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he does satisfy it. It is admitted that if this ship had been recovered from the bottom of the sea by any of the contrivances of modern skill and science available for that purpose, the body of the vessel would have passed to the underwriters. If, moreover, her value had proved to be more than the estimated value in the policy, the underwriters would still have been entitled to the vessel so recovered. And I think it is clear also, where we have, instead of the ship, the supposed value of the ship, or so much of it as the delinquent vessel could be called upon to contribute for that loss, that what is recovered must be taken to represent the lost ship; and then, just as the underwriters would be entitled to the ship if it could have been bodily got back, so they are entitled to that which is the representative of the ship in the shape of damages to be paid by the owners of the vessel which caused the collision. * * * It has always been considered as a settled rule in insurance law, as I started with observing, that where there is a total loss the underwriters, who pay upon a total loss, whether it is actual or whether it is constructive, are entitled to anything that remains of the

vessel and to anything which would otherwise have accrued to the owner of the vessel by reason of his ownership. Where the policy is an open policy, and simply a policy of indemnity as to the actual value of the vessel, no difficulty would arise in such a case as this. It is only because it is a valued policy that these difficulties present themselves. I think we must still apply the old rules and not make new; and *if a party chooses to have his vessel or his goods, as the case may be, taken at a fixed value instead of leaving the contract, as in an ordinary policy, simply one of indemnity to the extent of the real value, and if thereby any benefit accrues to the underwriters, the underwriters must be entitled to it.*"

Lush, *J.* in the same case (at p. 250), also said:

"I am of the same opinion. A person effecting an insurance may either agree upon the amount which is to be considered as the sum forming a complete indemnity, or he may leave it open. If he fixes the amount which he is to be paid in the case of a total loss, and the underwriter accepts that amount, then that amount must be binding upon both parties. If each of the parties agree that a certain sum shall be deemed to be the value of the thing insured, the underwriter, in the case of a total loss, is not to be at liberty to say the thing is not worth so much; he is bound to pay the amount fixed upon, whether it is the proper amount or not. And, on the other hand, the assured is not at liberty to say it is worth more; he is bound by that amount. It is for the purpose of avoiding all question about the value that the parties agree to fix that amount, and for all purposes, therefore, of adjusting the rights under that policy both the parties are bound by that value."

In *Mobile, &c. R. Co.* v. *Jurey* (111 U. S., 584, 594), the Court said:

"The payment of a total loss by the insurer works an equitable assignment to him of the property and all the remedies which the insured had against the carrier for the recovery of its value (*Mason* v. *Sainsbury*, 3 Doug., 61; *Yates* v. *Whyte*, 4 Bing. (N. C.), 272; *Clark* v. *Hundred of Blything*, 2 Barn. & C.,

254; *Ins. Co.* v. *Tyler*, 16 Wend., 385; *Ins. Co.* v. *Storrow*, 5 Paige, 285). * * *

"Insurers of a ship which has been run down and sunk by the fault of another ship are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a *valued* one, their payment of this value will give them the whole *spes recuperandi*, and the right to the whole damages, though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy (*Ins. Asso.* v. *Armstrong*, L. R., 5 Q. B., 244; see also *Clark* v. *Wilson*, 103 Mass., 227)."

Payment by the carrier of a loss in an amount agreed to represent the full value of goods, transfers the property in the goods to the carrier (*Hagerstown Bank* v. *Adams Express Company*, 45 Pa. Stat., 419).

In this case, the Adams Express Company sued the Hagerstown Bank to recover $3,315 of the notes of the bank, which the plaintiff averred were the property of the express company, by reason of its having paid a claim for the loss of the notes while in its custody, and which, it was afterwards discovered, had been canceled or destroyed, whereby the bank was relieved from all liability to redeem them. It appeared that a package containing $9,455 of the notes of the Hagerstown Bank was made up by the Merchants' Bank of Baltimore, and received by the Adams Express Company to be delivered to the Hagerstown Bank. On delivery of the package, it was found that $3,360 had been abstracted, and a bundle of newspapers cut to the proper size had been substituted. The express company was informed of the loss, and its superintendent, Mr. Bingham, gave his check to the cashier of the bank for the amount of the loss, obtaining at the same time the cashier's receipt therefor. The money had been stolen by an express messenger who subsequently burned notes of the value of $3,315 apparently to avoid detection. Burned fragments of the notes were found, and the jury determined as a fact that

the express messenger who stole the notes actually destroyed them to the amount stated.

The action of the express company against the bank was based on the theory that the property in the notes passed to the express company on payment of the loss; that if the notes had been recovered, the bank would have been bound to redeem them; that the destruction of the notes merely destroyed the evidence of the bank's debt, but not the debt itself; and that the bank was liable for the amount of its destroyed notes. From a verdict and judgment in favor of the plaintiffs, the defendant sued out its writ of error.

Woodward, *J.*, who delivered the opinion of the Court, said:

"The express company had undertaken to carry $9,455 of money from Baltimore to the Hagerstown Bank. It was the bank's property, and the carrier was bound by law to deliver it to them. An agent or clerk of the express company stole $3,360 from the package during its passage. It was the duty of the company to make good the sum to the bank. The bank could have recovered against them at law. When Colonel Bingham, therefore, on the 11th of October, paid to the bank $3,360 in settlement of the claim, he did only what the law would have compelled his company to do, and the bank received only what they are entitled in equity and good conscience to receive and retain. * * *

"But *the consequence of such settlement and payment was to transfer the property in the notes from the bank to the express company.* The bank having received the value of the notes had no further right to the notes themselves, and were bound to redeem them when presented, as they would redeem any other paper issued by them. Simmons, the company's agent, had the custody of the notes, but he had acquired no property in them, for he had taken them from his employers feloniously. He was bound in law and conscience to return them to his employers, in whom the title had now vested absolutely; and whilst he retained the custody, he must be considered as holding in trust for them. Whatever of the notes he passed away was the company's

loss, and whatever he destroyed inured to their benefit, for it entitled them to claim so much money from the bank as for destroyed notes of their issue."

Recovery on the theory of a conversion would lead to the same result. The libelants' right to recover the value of the goods which they failed to receive cannot be varied by the form of the action they choose to bring. For all purposes they have agreed with the carrier that as between them the value of the goods is the invoice value.

The measure of damages in conversion would be the value of the property at the time of the conversion (*Smith* v. *Forster*, 15 Vermont, 182; *Falk* v. *Fletcher*, 18 C. B., N. S. 405 (sailing away with cargo against the consent of the owner); *Forbes* v. *Boston Railway*, 133 Mass., 154 (delivery to wrong person); *Henshaw* v. *Bank*, 10 Gray, 568).

If it should be determined that there was a conversion at the port of loading and that the damages were the market value of the goods, these, doubtless, could not be greater than the invoice value, because it was at the port of loading that the goods were invoiced. If it should be determined that there was a conversion at the place where the goods should have been delivered, and that the market value of the goods there should be the measure of the damages the result would be the same, for, while a carrier may be held liable in trover for loss or wrong delivery or non-delivery of goods entrusted to him for carriage (*Bullard* v. *Young*, 3 Stew. (Ala.), 46), yet it is open to him to show that he had the goods in his possession under a contract limiting his responsibility, and the damages would not be different on the same state of facts whether the plaintiff sued in contract or in tort (*Hobbs* v. *London Railway*, L. R. 10, Q. B. 111; *Francis* v. *St. Louis*, 5 Mo. App., 7).

On the satisfaction of such decrees the claimant would have acquired title to the sulphur, under the rule that payment of a judgment recovered by the

plaintiff in trover for the value of the goods, or the amount which the jury awards for the value, operates to divest him of his property in the chattels converted, and to transfer his title to the defendant (*Campbell* v. *Phelps*, 1 Pick, 61; *Brinsmead* v. *Harrison*, L. R., 6 C. P., 584; *Elliott* v. *Hayden*, 104 Mass., 180; *Marsden* v. *Cornell*, 62 N. Y., 215; *Thayer* v. *Manley*, 73 N. Y , 305; *Baltimore Marine Ins. Co.* v. *Dalrymple*, 25 Md., 307; *Lovejoy* v. *Murray*, 3 Wall., 1; *Cooper* v. *Shepard*, 3 C. B., 266).

7. The terms of the stipulation itself show conclusively that the parties did not regard the actions as for delay in delivery, nor that the rights of the parties as they existed on August 12 were in any way changed by the stipulation.

In the first clause of the stipulation it was provided, "the goods upon arrival to be sold at current market rates." This was altogether inconsistent with the view that the goods were being forwarded to the consignee for his account under the original contract. In that event there could have been no provision for sale or disposition of the proceeds. The value of the sulphur received under those circumstances, would be applied as matter of law against the damages alleged to have been sustained by the libelants because of non-delivery.

Moreover, in the second clause, it is provided that the claimant shall have a lien on the sulphur for those charges the libelants would have had to pay "if they undertook to forward the cargo on their own account."

The third clause of the stipulation declared that anything done under it should "be deemed to be without prejudice in the pending suits." It seems difficult to imagine a clause which could provide more specifically that the stipulation should be without prejudice.

Yet the Court of Appeals looked at an act done under it (the forwarding of the cargo by the *Abbazia*) as one of the material facts on which it rested the finding that the measure of damages was the differ-

ence between the price the sulphur would have brought if sold *ex Styria* in June, and what it brought when sold *ex Abbazia* in October.

This is in direct violation of the terms and spirit of the stipulation.

It is plain that this measure of damages could not have been adopted if the carrier had not sent the goods forward as he did under the stipulation. In view of the reservation in the third clause, the Court was bound to disregard all acts done under the stipulation until after it had determined all questions in the suits on the facts as they were before the stipulation was entered into. In other words, the Court should have closed its eyes altogether to the fact that the cargo had been forwarded, *pendente lite*, and should have determined the cases on the issues as they stood before or on August 12th. The sole intended effect of the stipulation was to provide that after the cases had been decided without regard to what was done under it, a credit of the amount of the proceeds of the sale of the cargo should be set over against any damages that the libelants should be adjudged entitled to recover on the causes of action for non-delivery as defined in the pleadings.

The objects and provisions of the stipulation were disregarded or lost sight of in the first opinion; and in the second opinion, after the reargument, the Court bluntly refused to give effect to it, for reasons which are far from being satisfactory.

The Court states that it can make no difference how the sulphur was brought forward, if the claimant had failed to bring the cargo forward the owner could have withdrawn it from the Sicilian warehouse, paying the *Styria's* lien for expenses and freight, and could have brought it forward himself or sold it in Sicily (p. 363). No doubt he might have adopted either of those courses at any time prior to the payment by the ship of final decrees for the adjudged value of the sulphur; but if he had done so, the measure of damages would have been, not for

delay in delivery, because the forwarding of the goods by the goods owner would not have constituted delivery by the ship in any sense, but such as the Court would have awarded for non-delivery, less what the goods owner had realized by bringing the goods forward himself, and in determining the measure of the ship's liability the invoice clause would have been applied.

8. The Court of Appeals adopted a wrong principle, even on its own reasoning, in treating the case of non-delivery followed by the forwarding of the goods in another vessel, like a delay in carrying the cargo to destination in the original vessel, and in determining that the measure of damages in a case of transshipment is the same as in cases of delayed delivery by the same vessel.

In the case of *Smith* v. *Tregarthen*, 56 L. J., Q. B., 437; 6 Asp. Mar. Cas., 137, the defendant, the master of the steamer *Carbis Bay*, lying at Wilmington, signed bills of lading for 400 bales of cotton, "shipped on board" his vessel for Liverpool. In consequence of insufficient room only 165 bales could be shipped and the defendant directed that the 235 remaining bales be shipped by the *Wylo*, lying in the same port, and also bound for Liverpool. The *Carbis Bay* reached Liverpool on the 26th of October, and the *Wylo* on the 29th of October, and the whole 400 bales were delivered to and accepted by the plaintiffs who were indorsees of the bills of lading. Between the 26th and the 29th of October, the price of cotton fell, and the plaintiffs sued the defendant to recover the loss thus occasioned. Damages for loss of market by delay in delivery whether in an action of contract or of tort are not recoverable in England against carriers by sea on the ground that such damages are too remote (*The Parana*, 2 P. D., 118; 3 Asp., 399; *The Notting Hill*, 9 P. D., 105; 5 Asp., 241). It was held by Day and Wills, *JJ.*, that on the 26th of October the plaintiffs had a right of action for non-delivery; that the measure

of damages was the market value of cotton on that day, and that the subsequent delivery by the *Wylo* could only be taken into account in reduction of damages.

Wills, *J.*, said: * * * "On the arrival of that ship [*Carbis Bay*] she is found not to have the goods on board, and at that moment a right of action for non-delivery of the goods enures to the holders of the bills of lading. What takes place afterwards between the plaintiffs and defendants might have taken place in accord and satisfaction of the original cause of action, but there must have been an agreement to that effect. The delivery, ex the *Mylo*, is not delivery ex the *Carbis Bay*, and the only result of the subsequent transactions between the parties is the reduction of damages."

The only difference between that case and these cases is that here the measure of damages for non-delivery *ex Styria* was the *invoice* value, instead of the market value. The Court of Appeals should have followed the rule of the English case, and should have held that the subsequent delivery by the *Abbazia*, October 6th, could only be taken into account in reduction of the damages which accrued June 3d for non-delivery *ex Styria*, as limited by the invoice value. That was the rule adopted by the District Judge. The proceeds of sale of the cargo *ex Abbazia* about equalled, if they did not exceed the invoice value (fols. 1044, 1052, 1064–1065, 1111).

If the proceeds equalled only the invoice value the libelants at most should have decrees for interest on the capital involved, that is, the invoice value. If the proceeds exceeded the invoice value the libels should have been dismissed.

Nothing that the libelants could have done on their own initiative would have put them in a position to recover the amount of damages the Court of Appeals has awarded in consequence of the act of the shipowner in sending the goods forward by an-

other vessel, under the conditions and limitations of the stipulation of August 12th.

It is surely a novel proposition to the law that an injured party, by acts of his own subsequent to the injury may increase the amount the wrong-doer shall be bound to pay as compensation for his wrongful act.

This fact clearly shows that the Court has put a construction on the stipulation of August 12th, which prejudices the rights of the claimant, and hence is contrary to the provisions of the stipulation itself.

In treating the actions as for delay in delivery instead of for failure of delivery, the Court of Appeals said (p. 348): "There was no loss or deterioration of the sulphur, but there was a loss of market. * * * The measure of damages in such cases is well settled; the loss is the difference between the price the goods actually brought and the price they would have brought had they been sold on the day when they should have arrived. The only remaining question in the case is whether this method of calculation is modified by the expressed terms of the contract."

The only theory on which loss of market would be recoverable by the libelants would be that of delay in delivery of the goods. The cases here could not be regarded as for delay in delivery unless it should be considered that the sulphur was brought forward finally by the claimant pursuant to the original contract and bill of lading. In other words, it must be contended that there was an accord and satisfaction between the parties as to the libelants' right of action for non-delivery. This was not the fact.

If by any chance the Court should determine that the actions here were for delay in delivery, and that damages were sustained by the libelants by reason of the delay, it should be borne in mind that it was entirely within the power of the libelants to obviate the delay and consequently the damage.

The libelants knew that the master of the *Styria*

refused to carry the sulphur because of facts of war and in fact had sailed without it. They have consistently claimed that the sulphur was theirs all the time it was in Sicily, and that they might have disposed of it there as might have seemed to them most advisable. They have contended that sulphur might have been carried freely and safely from Sicily to New York at all times. They likewise contend that they were suffering great loss of market because they did not have the sulphur in New York. If their contention as to the safety of the passage of sulphur is correct, it is clear that they might have arranged for its quick transference from Sicily to New York and so cut off materially, if not entirely, the damage due to delay and a falling market.

It is an elementary principle of the law of damages that the injured person must not do anything to increase the damages sustained by him by reason of the wrongful act of another. He does in fact increase such damages if they become enhanced because of some neglect of his own, for his own act or default thus becomes the *causa causans* of the damage.

The rule is stated even more strongly in *Hamilton* v. *McPherson* (1863), 28 N. Y., 72. In that case the defendants had contracted to transport a quantity of oats from Perth in Canada to Oswego. They negligently failed to send a vessel to Perth to take the oats with reasonable diligence. The oats became heated and damaged by reason of the hot weather during the delay at Perth.

Selden, *J.*, said at page 76:

"The delay, if proper care had been bestowed upon the oats, would not have resulted in their injury. The direct cause of injury, therefore, was the want of care. The necessity for extra care arose from the delay, and the expenses attending such necessary care, if it had been bestowed, would have been the direct result of the defendants' breach of contract. For such expenses they would have been answerable, but were not answerable for

the damage which *resulted from the failure to bestow that care.* The law, for wise reasons, imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him" (*Miller* v. *Mariners' Church*, 7 Greenleaf, 51; *Shannon* v. *Comstock*, 21 Wend., 461; *Heckscher* v. *McCrea*, 24 *Id.*, 306; *Clark* v. *Marsiglia*, 1 Denio, 317; *Spencer* v. *Halstead*, *Id.* 606; *Loker* v. *Damon*, 17 Pick., 284).

See also

Cook v. *Soule*, 56 New York, 420, 433.
Hitchcock v. *Hunt*, 23 Conn., 343.

Therefore, in this instance also the libelants should not be allowed to recover from the claimant for the consequences of a wrongful act which was in fact their own.

9. It is impossible to state what contentions will be made in this Court by the libelants, in view of the decision of the Circuit Court of Appeals, but it is altogether clear from the original briefs filed by the libelants in the Court of Appeals that their counsel did not regard the cases in any other light than for non-delivery.

In the separate brief of Morgan, filed by Mr. Burlingham, the following passages occur:

"The suits against the *Styria* are not brought to recover for *damage* to goods nor for *detention* of goods. They are brought for the *refusal of the shipowners to deliver* the goods at all (p. 5). * * *

"The stipulation of August 12, 1898, does not modify the ship's liability.

"This is conceded by the counsel for the *Styria* (Brief, p. 39).

"The provision that the goods landed *ex Styria* at Porto Empedocle should be forwarded 'upon the terms and for the freight specified in the original bills of lading,' was made for convenience merely.

It was, of course, proper that some bill of lading should be issued and some freight fixed, and the original bill of lading was as good as any other for that purpose. The forwarding, however, was in no sense for the account of the libelants, as appears clearly in the second paragraph of the stipulation, which provides that the claimant shall have a lien upon the cargo for the charges and expenses against the same 'which the libelants would have had to pay * * * *if they undertook to forward the cargo for their own account*' (fol. 63).

"It was clearly to the advantage of the ship to have the goods sent forward to New York, where they could be sold; for if the shipowners were held responsible for an unlawful landing of the goods they would have to pay libelants' claim to the extent of the value of the vessel, *and besides would have on their hands a quantity of brimstone, for which there was probably no market in Sicily.* In these circumstances they entered into negotiations with the libelants, and the result was the stipulation of August 12th" (pp. 8, 9).

While in the brief filed by counsel for the libelants, Morgan, Malcolmson & Munroe, damages based on the market value of the sulphur in June are asked for, yet it is conceded that the case is one of non-delivery, for the passage occurs (p. 28) "the damages to the libelants *from the failure to bring this cargo by the Styria* should be estimated in the ordinary way."

The brief filed for the libelant Parsons was drawn on the theory of a conversion by the claimant. In his original brief, after referring to the demand on the master for the sulphur on the arrival of the *Styria* and the non-delivery, he says (p. 18): "He (the master) is thus *prima facie* liable for a conversion of the libelants' brimstone, or he is liable for a breach of contract to carry and deliver it." In a case of conversion or of breach of contract to carry and deliver there can be no question of delay in delivery.

In that brief it is admitted (p. 20) that "the invoice value would see" the shippers of the sulphur

whole, but it was contended that the purchasers of the bills of lading in some way had greater rights than the shippers.

The pleadings, the stipulation and the contentions of the respective counsel show that it was not understood by the parties that the rule for measuring the damages was changed, or affected, by the stipulation of August 12, 1898, or by the forwarding of the cargo under it, and its conversion into cash; except that such cash was to be credited to the ship if damages were adjudged against her. All the counsel are agreed; (1) that the actions are for non-delivery; (2) that against the damages, as determined by the Court, the ship is to have a credit of the net proceeds of sale, and (3) that the damages for non-delivery are limited to the invoice value in the first instance, and before the credit is given, unless something in the quality of the master's act makes the clause inapplicable, or unless it is inapplicable, by reason of its terms, to this kind of a case.

The only real difference between the parties was as to the office of the clause limiting the ship's liability to the invoice value as applied to the circumstances of these cases.

The Court also say that when the stipulation was signed "no answers had yet been interposed nor claims made that the damages must be scaled down to the invoice value."

It is true that the answers had not yet been put in, but that fact can have no bearing properly on these cases. In each one of the libels the bill of lading had been set up or referred to as the basis of the contract of carriage (*ante*, *pp.* 96–98). The testimony of the master had been taken, and the bills of lading had been produced by the libelants in evidence (fols. 400, 404) on June 8 (fol. 386). There can be no question therefore but that the libelants were fully informed long before the stipulation was made of the clause in the bill of lading limiting the ship's liability to the invoice value.

The claim of the limitation of the ship's liability

was duly made in the claimant's pleading. It is not altogether clear to the claimant how its contention could have been put on the record, prior to the filing of the answer.

10. The Court says further, that the language of the stipulation does not import such a one-sided agreement as would result from a construction of it which would require the damages to be assessed in accordance with its terms, "so that although, concededly, they [libelants] have lost over $20,000, through the ship's misconduct, they cannot recover anything, while by the same stipulation the ship gives up nothing" (p. 364).

As a matter of fact, in the result, the ship "gave up" more than $5,000, under the stipulation of August 12th, in paying charges on the sulphur and the cost of reloading it and forwarding it, which was disallowed to her in the District Court.

All that either party "gave up" on the signing of the stipulation was a contingent loss according to the market value of the sulphur when it should arrive. If that value should be more than the invoice value the libelants would gain and the claimant would suffer no loss, because the libelants would have suffered no loss. If it should be less than the invoice value the claimant would have to make up the difference.

It is not conceded that the libelants "have lost over $20,000 through the ship's misconduct." At most they have lost a speculative profit. Under the terms of the contract of carriage it would be most inequitable t allow them to recover any such loss from the claimant.

It is not necessary for the claimant to contend that it is entitled to any excess of the proceeds of the sale of the sulphur above its invoice value. It should be sufficient for the libelants that it does not make any claim to such excess here.

The libelants contended in the court below that the suggestion of such a claim would be monstrous,

and would be a *reductio ad adsurdum* of the theory advanced by the claimant as the proper one for the disposition of these cases. The claimant by no means admits this. On the contrary, it might well result that under certain circumstances where the carrier has paid for the loss of an article that it failed negligently to deliver, and the article should be recovered subsequently, its value might have appreciated, and the carrier might secure from its sale more than had been paid for its loss. This result is not altogether unusual in insurance cases where the insurer has paid for a total loss and taken the thing itself. It would seem that the case of a carrier should rest on the same basis. No decision has been found that the carrier in such case would be liable to the original owner in any form of action for the excess. It does not seem a necessary determination by the Court here in the decision of these cases.

If there should be any such excess here it would mean that the libelants had not suffered any damages, for it is an unquestioned principle that if the consignee or owner of the goods has in fact received them, their value will reduce *pro tanto* his damages. The damages here were the amount of the invoice value, and if the proceeds of sale should be credited against these damages, there would not be any deficit to be made good by the carrier. This is the procedure contemplated by the stipulation, and it is the result that would have been obtained if the consignee had received the goods, though there had been no stipulation.

The claimant does not say that the sulphur would not ever be worth, at any place, more than the invoice value, but it does say that the consignees under the bills of lading here cannot claim more than the invoice value simply because its price has fluctuated and they have lost a possible profit.

The consignees would not have any reason to complain if the sulphur had not been brought forward, but if the claimant had paid decrees here for the invoice or full value of the cargo, and then either had

sold it in Sicily, or had brought it here on their own account, as it had the right to do, and then sold it for a sum largely in excess of the invoice value. The consignees and libelants had their election, but they could not both recover the value of the sulphur and also retain the sulphur or its equivalent.

In effect they are trying to do that here, and the decision of the Court of Appeals would seem to sanction the attempt.

It is submitted that even if the master committed an error in relanding and storing the sulphur, none of the libelants, save only the libelant Munroe, has sustained any damage that he is entitled to recover against the shipowner.

Last Point.

The decrees appealed from should be reversed, with costs, and the causes remanded with instructions to enter decrees in the principal cases dismissing the libels, with costs, and to enter decrees in the cross-actions for freight in favor of the libelants, with costs.

Dated New York, November 20, 1901.

Respectfully submitted,

CONVERS & KIRLIN,
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CHARLES R. HICKOX,
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